DOCKET

(10)

No. 83-6607-CSY
Status: GRANTED
CAPITAL CASE

Title: Bobby Caldwell, Petitioner
v.
Mississippi

Court: Supreme Court of Mississippi

Counsel for petitioner: Boyle, E. Thomas

Docketed:
April 20, 1984

Counsel for respondent: Boyd III, William S.

Entry	Date	Note	Proceedings and Orders
1	Mar 3 1984		Application for extension of time to file petition and order granting same until May 2, 1984 (White, March 6, 1984).
2	Apr 20 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	May 21 1984		Order extending time to file response to petition until June 19, 1984.
6	Jun 22 1984		Order further extending time to file response to petition until July 3, 1984.
7	Jul 11 1984		Brief of respondent Mississippi in opposition filed.
8	Jul 6 1984		Order further extending time to file response until July 6, 1984.
9	Dec 6 1984		DISTRIBUTED. **********
10	Jul 23 1984	X	Reply brief of petitioner Bobby Caldwell filed.
12	Oct 1 1984		REDISTRIBUTED. October 5, 1984
14	Oct 9 1984		Petition GRANTED. **********
15	Nov 5 1984		Joint appendix filed.
16	Nov 23 1984		Brief amicus curiae of National Assn.of Criminal Lawyers, et al. filed.
17	Nov 28 1984		Brief of petitioner Bobby Caldwell filed.
18	Dec 6 1984		Record filed.
20	Dec 17 1984		Order extending time to file brief of respondent on the merits until January 7, 1985.
21	Jan 4 1985		Brief amicus curiae of Arizona, et al. filed.
22	Jan 4 1985		SET FOR ARGUMENT. Monday, February 25, 1985. (1st case.)
23	Jan 7 1985		Brief of respondent Mississippi filed.
24	Jan 15 1985		CIRCULATED.
25	Feb 4 1985	X	Reply brief of petitioner Bobby Caldwell filed.
26	Feb 25 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

IN THE

SUPREME COURT

OF

THE UNITED STATES

83-6607

OCTOBER TERM, 1983

NO.83-

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, BOBBY CALDWELL, respectfully applies for leave to proceed here in forma pauperis, and for permission to file the petition for writ of certiorari without prepayment of fees, pursuant to Rule 46 of the Rules of the Supreme Court. The affidavit of petitioner in support of this application is annexed.

Dated: Smithtown, New York
April 18,1984

Respectfully submitted,

E. Thomas Boyle

E. THOMAS BOYLE, P.C.
Attorney for Petitioner
BOBBY CALDWELL
27 West Main Street
P.O. Box 846
Smithtown, New York 11787
(516) 265-1166

JAN 10 1984

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1984

NO. 83-

BOBBY CALDWELL,

Petitioner,

- against -

STATE OF MISSISSIPPI,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, BOBBY CALDWELL, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below, relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   None.

6. The courts of the State of Mississippi granted leave to proceed in forma pauperis at all levels.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties of perjury.

Bobby Caldwell
BOBBY CALDWELL

STATE OF MISSISSIPPI)
COUNTY OF SUNFLOWER) SS.:

Subscribed and sworn to before me this 4 day of January, 1984.

Jeff L. Porter
Notary Public
My Commission Expires Jan. 23, 1985

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Supreme Court Justice

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1983

NO.

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND
THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, BOBBY CALDWELL, respectfully requests that a writ of certiorari issue to review the order of the Supreme Court of Mississippi, dated November 16, 1983, which affirmed the judgment of the Circuit Court of De Soto County, dated December 1, 1981, and sentence to death pursuant to Mississippi Code § 99-19-101.

QUESTIONS PRESENTED

1. Whether the comments by the prosecutor - approved by the court - during summation at the sentencing phase of the trial that the jury's determination of the death sentence was reviewable and non-final diminished the jury's responsibility for imposition of the death penalty in violation of the due process clause of the United States Constitution?

2. Whether the denial of the indigent petitioner's request for appointment of an investigator and a ballistics and fingerprint expert at state expense, violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

3. Whether the prosecutor's statements on summation at the sentence phase of the trial - that he had never tried a capital case where the death penalty was a more appropriate sentence - violated the petitioner's right to a fair trial under the Fifth and Fourteenth Amendments and violated the confrontation clause of the Sixth Amendment to the United States Constitution?

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OPINION BELOW

The Supreme Court of the State of Mississippi affirmed the judgment in an opinion rendered on November 16, 1983, Bobby Caldwell v. State of Mississippi, 443 So.2d 806 (Miss. 1983). The opinion is annexed hereto as Exhibit "A".

JURISDICTION

The order of the Supreme Court of Mississippi was entered on November 16, 1983. Timely petition for rehearing was filed with a request for a stay of execution pending application for certiorari to this Court. Rehearing was denied on February 1, 1984, however by order dated December 14, 1983, the Supreme Court of Mississippi stayed execution of the sentence pending further order of that Court. A timely request for a 30 day extension of time to file a petition for writ of certiorari was filed by the petitioner on February 28, 1984, and such application was granted by Justice White on March 6, 1984, thereby extending the time for filing to and including May 2, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment which, in relevant part, states:

> [N]or be deprived of life, liberty, or property, without due process of law;

and the Sixth Amendment, which in relevant part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defense;

and the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was charged with capital murder arising from the robbery and shooting of Elizabeth Faulkner on October 29, 1980. Petitioner was sentenced to death on October 7, 1981.

On November 16, 1983, the Mississippi Supreme Court affirmed the conviction and sentence. Bobby Caldwell v. State of Mississippi, 443 So.2d 806 (Miss. 1983). The affirmance was unanimous with respect to errors claimed by the petitioner during the guilt phase of the trial, however, the court split 4 to 4, with one judge disqualifying himself, with respect to the error involving the comments of the prosecutor and the trial judge concerning the appellate review of the jury's determination on the death penalty. (Question Presented # 1.) By order dated December 14, 1983, the Supreme Court of Mississippi stayed execution of the sentence pending further order of that Court.

Petition for rehearing was denied on February 1, 1984*.By order dated March 6, 1984, Justice White extended the petitioner's time to file petition for certiorari to and including May 2, 1984.

B. Facts Relevant to the Questions Presented

1. Petitioner's Challenge to the Remarks by the Prosecutor and the Trial Court During Summation at the Sentence Phase of the Trial Concerning the Non-final Nature of the Sentence Imposed and Appellate Review of the Sentence

At the sentence phase of the bifurcated trial the prosecution re-introduced the evidence from the guilt or innocence phase of the trial. In addition, the prosecution introduced records of petitioner's four prior criminal convictions involving crimes of violence (606-620**).The petitioner's case at the sentence phase consisted in the testimony of petitioner's parents, sister and fiancee (621-650).

Pursuant to Mississippi law, the trial judge first instructed the jury on the law (719-722), then the prosecutor was permitted summation followed by defense counsel and then the prosecution closed with rebuttal argument (664-692).

a. Instructions on the Law

The Court,in relevant part, charged that the issue to be decided by the jury was "whether the defendant will be sentenced to death or to life imprisonment" (719).

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* Annexed hereto as Exhibit "B".
**Numbers in parentheses refer to pages of the record filed in the Mississippi Supreme Court.

b. Comments by Defense Counsel

Counsel argued that the jury should spare the petitioner's life and impose a sentence of life imprisonment (673-679*). The prosecution made no objection to these remarks. The remarks which the State claims precipitated the prosecutor's comment on summation are as follows:

> COUNSEL FOR DEFENDANT (Mr. Crow): Ladies and gentlemen of the Jury, when we started this trial Tuesday, I stated that sometime during this week, you'll be called upon to make one very important decision, probably one of the most important decisions of your life. That is whether to spare the life of another person or kill him, and that's what you'll decide. It's a hard decision. I'm glad I'm not in your chair. What has happened, needless to say, is very terrible. What Bobby Caldwell did is by no means excusable, and he should be severely punished for it. It's a terrible thing when a person's life is taken. He stands before you today and asks that you spare his life. He asks that the rest of his life be spent behind bars. An inmate in the Georgia State Prison wrote a poem and I'd like to read it to you. He titled it "Judgment". It starts off and says, "I prayed and prayed. I've asked the Lord if he judged my trial. When asked for mercy, would he remain cold? Would he make me walk that last mile? Would he be ashamed of my lifeless burned body? A deed he could have easily stopped. If He were the Judge who sentenced me, could he have chose (sic) death? No, I think not. Do you actually believe our Father in Heaven hates me and doesn't care? Do you actually believe he delights in my death and destroyed me in the electric chair? I see in your hearts, you know it's not true, but there's a weakness, a list for revenge. If Jesus felt this way toward you, forget Heaven, no one could get in. Yet I understand and know how you feel because I feel the pain of innocent life lost and parentless children. My soul cries out full of shame. We're all God's children. We care, honor and love, forgiveness, and we have mercy, too.

* The entire summation by defense counsel is annexed hereto as Exhibit "C".

> Forgive my mistake. Lend me your hand. Please judge me as Jesus would do." Six hours after he wrote this, he was electrocuted. Now, I'm not standing here before you asking you to forgive this man for what he's done. It's impossible. I can't do that. I'm asking you to put him in jail for the rest of his life. He's violated one of the Ten Commandments. "Thou shalt not kill." But, doesn't that apply to us, too? Should we make it our decision to kill someone else? One of the most remarkable phrases I've ever heard was said by a man who was nailed to the cross, who was tortured and just before he died, he said these words, "Father, forgive them for they know not what they do." (678-679).

c. Rebuttal by Prosecution

In rebuttal the prosecutor argued, over timely defense objection, that the jury's determination was "not the final decision" but rather is "reviewable"* (680). The trial judge overruled the objection, and confirmed to the jury that "it is reviewable automatically as the death penalty commands"(680). The prosecutor thereafter repeated his argument that the jury's determination of the sentence was not the final decision" but rather was "automatically reviewable".

The record in relevant part reads as follows:

> ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet, they ...

* The entire opening remarks of the prosecution are annexed hereto as Exhibit "D". The rebuttal remarks are at Exhibit "E".

COUNSEL FOR DEFENDANT (Mr. Horan): Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright (sic), go on and make the full expression so the Jury will not be confused. I think it proper that the Jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and, I think it's unfair and I don't mind telling them so. (680-681)

d. Decision by the Mississippi Supreme Court

The Supreme Court of Mississippi split 4 to 4 on the issue relating to the prosecutor's and the Court's remarks concerning the non-final and reviewable nature of the death sentence.

i. Opinion of the Court*.

In affirming, the Court relied on the rationale and reasoning of California v. Ramos, U.S. , 103 S.Ct. 3446 (1983) and concluded:

* The opinion of the Court below is annexed hereto as Exhibit "A". The court addresses this issue at pp. 11-15 thereof.

> By the same reasoning, states may decide whether it is error to mention to jurors the matter of appellate review, which review is mandated by our statute: Mississippi Code Annotated § 99-19-105 (Supp.1982). On this basis, we think, upon the facts of this case, reversal is not warranted merely because the jurors,during the sentencing phase, were told that death penalty trials are subject to appellate review by this Court.
> Opinion at 13, annexed as Exhibit "A".

The Court claimed that defense counsel "inaccurately sought to convince the jury that if they meted out a life sentence, the defendant would remain in prison the remainder of his life". Opinion at 13, annexed hereto as Exhibit "A".

The Court further noted that although the issue had been briefed by both sides, and preserved by objection at trial, it has not been "raised by the assignment of error". Opinion at 14, annexed hereto as Exhibit "A".

ii. Dissenting Opinion

The dissenting opinion*, joined in by three other judges, maintained that the jury's determination on the death issue had been tainted by the improper remarks of the prosecutor.

The dissent reasoned that "the gravity and uniqueness of the death sentence require that jurors in a capital case view their role with particular importance ... [and] nothing [should] occur at trial which lessens or diminishes the jurors' perception of their responsibility". The remarks of the prosecutor and the trial judge "had this effect".

The dissent relied on Howell v. State, 411 So.2d 772

* The dissenting opinion is annexed to the appendix as Exhibit "A" at pp. 1-5 following the opinion of the Court.

(Miss. 1982) wherein the prosecutor's argument which informed the jury that the verdict was subject to a right of appeal constituted reversible error.

The dissenting opinion states:

> In the instant case the error went far beyond that in Howell. In Howell the prosecutor repeatedly ignored the trial court's ruling that his comments concerning appellate review were improper. Here the prosecutor's comments went so far as to not only lessen the jury's sense of responsibility but to practically remove it altogether. The prosecutor argued:
>
> > Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they .... (Emphasis in original).
>
> At this point the defense counsel objected and the prosecuting attorney responded:
>
> > Your Honor, throughout their argument, they said this Panel was going to kill this man. I think that's terribly unfair. (Emphasis in original.)

The trial court then compounded the error with a ruling that crowned it with a false halo of propriety:

> All right, go on and make the full expression so the jury will not be confused. I think it is proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused. (Emphasis added.)

The prosecuting attorney then made his "full expression". He argued that defense counsel had insinuated

> that your decision is the final decision and that they're going to take Bobby Caldwell out in the front of this courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.

> A reading of the prosecutor's comments coupled with those of the trial judge could certainly give a juror the impression that the jury's decision was nothing more than window dressing. Not only did those comments reduce the jury's sense of responsibility, they were factually inaccurate. A jury should not be told that they are not "going to kill this man" if they decide to impose the death penalty. The purpose of a bifurcated trial is to ensure that it is indeed solely the jury that condemns an accused to die and that they have no partners in the exercise of that awesome responsibility. Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness. When a jury is faced with so solemn a task as deciding whether to impose the death penalty we must not allow their sense of responsibility to weaken. In my view the majority's opinion takes a step backward from Howell, a step which I feel is misguided.
>
> Dissenting opinion, annexed hereto as Exhibit "A" at pp. 2-3.

In further countering the majority opinion, the dissent states:

> The majority's opinion fails to make it clear just why the remarks in question are not reversible error, although two possible alternatives are discussed; invited error and failure to raise the issue on appeal. Apparently, the majority has decided that defense counsel invited error by arguing that the jury should sentence Caldwell to life imprisonment. Here the majority's position fails in two regards. First, because the statute provides only two possible sentencing alternatives, life imprisonment or death. Defense counsel has little choice but to plead that his client be sentenced to life imprisonment. Section 99-19-101 Miss. Code Ann. (Supp. 1983). It is a twisted bit of logic indeed that denies a defendant's counsel the right to argue the only statutory alternative to death without calling that argument an invitation to error. Secondly, the concept of invited error fails because it is simply inapplicable to the facts of this case. Assuming without accepting the majority's position that the defense counsel's argument invited error, it certainly did not invite this error. Asking the jury to show mercy

does not invite comment on the system of appellate review. This is true whether the plea for mercy discusses Christian, Judean or Buddhist philosophies, quotes Shakespeare or refers to the heartache suffered by the accused's mother. The plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy. Therefore, the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die. Defense counsel's plea for Caldwell's life did not invite the comment in question. (Emphasis in original). Dissenting opinion at pp. 3-4, annexed as Exhibit "A".

With respect to the petitioner's failure to assign this as error, the dissent stated:

The only other basis in the majority opinion for refusing to find that the comment was reversible error is a brief mention that an objection was made but that it was not assigned as error on this appeal (footnote omitted). In Hill v. State, 432 So.2d 427 (Miss. 1983) we reaffirmed Howell and held that comments of this nature are "clearly erroneous and would ordinarily be highly prejudicial." 432 So.2d at 439. In Hill, unlike the present case, there was no contemporaneous objection to the prosecutor's comments. We refused to reverse Hill because of the difficulty of distinguishing between trial tactics and simple failure to object. Here we are not faced with that problem. The failure to assign the matter as error could in no way be called a deliberate trial tactic. Surely we will not send a man to the gas chamber because his attorney failed to address an obvious error. We have repeatedly held that we give a heightened review in capital cases. Laney v. State, 421 So.2d 1216 (Miss. 1982); Irving v. State, 361 So.2d 1360 (Miss. 1978). If the concept of heightened review is to have any meaning it must stand for the rule that we will not allow reversible error to be ignored because of the attorney's failure to raise it. The purpose of heightened review is to insure that a procedural bar does nor become a guillotine. I would reverse the sentencing phase of the bifurcated trial and remand for a new trial on sentencing alone.

Dissenting opinion at 4-5, annexed hereto as Exhibit "A".

2. Petitioner's Challenge to the Court's Refusal to Provide Him with an Investigator and Ballistics and Fingerprint Expert

a. The Motion

Petitioner's counsel, by written motion* (25-26), requested that the defense be permitted to employ a special investigator and a fingerprint and ballistics expert at State expense**.

In support of this application counsel stated that the State had received notice of 35 potential witnesses and that counsel did not "have adequate time to properly investigate and interview" these persons (25). Counsel further stated that the petitioner had been "adjudicated to be ... indigent" (26) and that a private investigator, and a fingerprint and ballistics expert" would be "of great necessarius" in the defense of the charges lodged against him in the indictment (26).

b. The Denial

The Court granted*** the motion as to the appointment of a psychiatrist. With respect to the investigator and ballistics and fingerprint experts the Court denied*** the request:

The Court having considered the other phases of the motion to employ a special investigator at the State's expense and to employ a fingerprint and ballistics expert, and based on recent Mississippi cases, the Court holds that part of the motion is not well taken, and is by the Court overruled (32).

* This motion is annexed to the appendix as Exhibit "F".
** Also requested was appointment of a psychiatrist. This was the only part of the motion that was granted.
*** This order, dated September 9, 1981, is annexed to petitioner's appendix as "G".

The prosecution called a ballistics expert at the trial who testified that the bullets that killed the victim "could only have been fired in" petitioner's gun seized from his car (496). The defense on cross-examination did not dispute the expert's findings. In addition, an expert witness testified that the boot tracks observed near the scene of the crime matched boots belonging to the petitioner (505). The defense declined any cross-examination of this witness.

c. The Decision of the Mississippi Supreme Court

The Court sustained the denial on two grounds: (1) an indigent is entitled only to assigned counsel under the Federal and State Constitutions and (2) the petitioner's motion failed to describe the "specific costs" and the "purpose and value" of the requested services (opinion of Mississippi Supreme Court at 9, annexed hereto as Exhibit "A").

More specifically, the Court stated:

> Caldwell's third assignment of error contends that the refusal of the trial court to grant his motion that he be provided with an expert in the field of ballistics and an investigator was a denial of due process. Prior to the trial Caldwell filed a motion for an order that he be provided with psychiatric and ballistic experts at state expense. The trial court granted the motion as to the psychiatric expert but denied the ballistic expert. In Phillips v. State, 197 So.2d 241 (Miss. 1967) this Court ruled on the necessity of providing criminal defendant with a psychiatric expert:
>
> > Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel. (Emphasis ours). 197 So.2d at 244.
> >
> > Opinion of the Mississippi Supreme Court at 9, annexed hereto as Exhibit "A".

> In the case of Bullock v. State, 391 So.2d 601 (Miss. 1980), this Court went further to say that the failure to outline specific costs and in specific terms the purposes and value of such requested expert rendered the trial court's refusal to authorize such expenditure non reversible. In the instant case Caldwell's motion simply included the general statement that the requested expert "would be of great necessarius witness". It did not estimate the cost of such expert nor the specific value. Therefore, the trial court's failure to provide the requested expert witness or investigator did not constitute reversible error.
>
> Opinion of Mississippi Supreme Court at 9, annexed hereto as Exhibit "A".

3. Petitioner's Challenge to the Prosecutor's Remarks on Summation at the Sentence Phase-Based on His Comparison of this Case with Other Cases He Had Tried-That Death Was the Only Appropriate Sentence Here

The Assistant District Attorney expressed his personal belief that - compared with other capital cases he had tried - death was the only appropriate sentence here:

> I think the course is clear. I have tried cases where the death penalty has been imposed by juries, even in this very Courtroom. I've tried cases, even in this Courtroom, where I asked for the death penalty and the jury didn't give it. But never ever, ladies and gentlemen, have I ever tried a case where the facts and circumstances surrounding the case call out for and demand the death penalty -- never -- I assure you on my word, that I have never ever tried a death penalty case in the Courthouse or any other place, where the penalty is more apparent and more called for (685).

Defense counsel made no objection at trial. The issue was not raised on appeal.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S ARGUMENT THAT THE JURY'S IMPOSITION OF THE DEATH PENALTY IS NON-FINAL AND SUBJECT TO APPELLATE REVIEW UNCONSTITUTIONALLY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED SENTENCE IN A CAPITAL CASE

This case presents an issue that the Court has never determined: the constitutional limits of prosecutorial argument aimed at lessening the jury's responsibility in returning a sentence of death. The prosecutor argued - and the trial court condoned - comments that the jury's determination imposing the death penalty was "not the final decision" and was "automatically reviewable" by the State's highest court.*

While the Mississippi Supreme Court split 4-4 on this issue, all 8 of the judges agreed that under Ramos v. California, U.S. , 103 S.Ct. 3446 (1983), this issue was void of constitutional overtones and therefore should be decided strictly as a matter of state law.

California v. Ramos, U.S. , 103 S.Ct. 3446 (1983) involved the constitutionality of instructions to the jury at the sentence phase that apprised the jury that the defendant was subject to parole in the event that life imprisonment was imposed. The Court held that this was accurate information which enabled the jury to fullfill its obligation in meting out the appropriate life or death sentence.

In sharp contrast to the instructions in Ramos, the comments here, as noted in the dissenting opinion of Judge Lee,

* A similar argument was made by the prosecutor in Maggio v. Williams, U.S. , 104 S.Ct. 311 (1983), however defense counsel there failed to object and the Court refused to consider the error on habeas corpus review. In a concurring opinion however, Justice Stephens addressed the merits of the issue and stated:

> In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake. Maggio v. Williams, supra, U.S. , 104 S.Ct. at 316 (concurring opinion, Justice Stephens).

had the effect of "lessening a juror's sense of responsibility for the fate of the accused":

> Those jurors who are not convinced that a defendant's life should be taken, may not argue so strongly or hold their position when they are led to believe that a reviewing court will correct a mistake in their judgment. Dissenting opinion at 2, annexed as Exhibit "A".

The prosecutor here advised the members of the jury that they were not the ones responsible for the defendant's death, when in fact they were:

> Now, they [defense counsel] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.

When defense counsel timely objected, the prosecutor retorted:

> Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

Instead of curing this flagrant error by proper cautionary instructions, the trial court condoned the prosecutor's comments:

> All right, go on and make the full expression so the jury will not be confused. I think it is proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused.

The prosecutor then made his "full expression" that the jury's determination was not "the final decision" and was subject to automatic review by the State's highest court:

> [Defense counsel]: insinuat[ed] that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of the Courthouse in moments and string him up and that is terribly unfair. For they know, as I know, and as Judge Baker has told you, that that decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so (681).

The issue here is far different from attempting to predict individual future behavior, as in Ramos. This Court held that there was no diminishment of the jury's responsibility for its verdict in Ramos, but rather, a fostering of such responsibility by providing the jury with the information needed to mete out the appropriate sentence.

Here, just the converse is true. Advising a jury that a death sentence is non-final and subject to appellate review is deceptive* and detracts from the jury's overall responsibility for its decision. These comments divert the jury from "undertaking the kind of individualized sentencing determination that under Woodson v. North Carolina, 428 U.S. at 304, is a 'constitutionally indispensable part of the process of inflicting the penalty of

---

* By statute, the Mississippi Supreme Court's review of the jury's determination of death is limited to:

> (a) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance .... and
>
> (c) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Mississippi Code 1972 Ann. § 99-19-105 (1983 Supp.)

As Judge Lee noted in his dissenting opinion:

> Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness. Dissenting opinion at 3, annexed hereto as "A".

death'", California v. Ramos, supra, U.S. at , 103 S.Ct. at .

This Court, in Ramos, acknowledged the problems caused by remarks to a jury that conveyed the impression to the jury that its determination was not "final":

> In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final" may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.
> California v. Ramos, supra, U.S. at , 103 S.Ct. at (O'Connor, J.)(1983)

Individualized sentencing by the jury in capital cases is essential to the constitutionality of a statutory scheme. Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, U.S. , 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-252 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-306 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977). Advising the jury that the sentence is non-final and subject to appellate review unconstitutionally detracts from the jury's responsibility to impose such a sentence.

The State below noted in its brief in the Mississippi Supreme Court that this "issue is far too vital to be left to purely procedural handling" and that the issue is one "of common appearance in recent capital cases" in the State of Mississippi. Appellee's Supplemental Brief at 1. Defense counsel made timely objection. The mere fact that it was not included in the assignments of error, should not preclude the Court

from addressing such a critical issue in a death case. Moreover, the issue was briefed by both parties below prior to the decision by the Supreme Court of Mississippi. Accordingly, it is properly preserved for review. Because this issue frequently arises in capital cases it should be reviewed by this Court.

The majority's statement below that defense summation invited the prosecutorial response is without merit. Defense counsel argued the only two sentencing alternatives available to his client under the Mississippi statutory scheme*. As the dissent stated below "[t]he fact that appellate review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die". Dissenting opinion at 4, annexed hereto as Exhibit "A". Defense counsel's plea for petitioner's life did not invite the comment in question.

II. THE PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY DENIAL OF HIS REQUEST FOR ASSIGNMENT OF A CRIMINAL INVESTIGATOR AND A BALLISTICS AND FINGERPRINT EXPERT**

This Court recently granted certiorari in Ake v. Oklahoma,

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* Mississippi Code § 99-19-101 in relevant part provides:

(1) Upon conviction or adjudication of guilt of a defendant of capital murder .... the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

** In the Mississippi Supreme Court the State took the request for a fingerprint expert to mean someone who could address the issues raised by the State's expert on the cast of the footprint taken near the scene of the crime which matched the petitioner's boots. Appellee's brief at 25 n.17.

52 U.S.L.W. 3710 (March 27, 1984)(No. 83-5424). The question presented there is whether the State can constitutionally deny an indigent defendant the assistance of a court-appointed psychiatrist in a death case in which there is an issue as to the defendant's sanity at the time of the offense, and where the State relies on expert psychiatric testimony to establish the aggravating offense of predicted future violence.

While the petitioner here was afforded the services of a psychiatrist, the Court denied the application with respect to a criminal investigator, and a ballistics and fingerprint expert. The State relied on expert testimony on its case in order to show that the bullets that caused the victim's death were fired from the gun belonging to the petitioner. Expert testimony by the State further showed that the cast taken of the defendant's footprint found near the scene of the crime matched boots belonging to the petitioner. Petitioner was unable to even attempt to discredit this evidence.

The same considerations that warrant appointment of a psychiatrist, also warrant appointment of a ballistics and fingerprint expert, and a criminal investigator. In the case here, these are minimal requirements essential to providing the accused a fair trial. Denial of the services of these experts and a criminal investigator "preclude the giving of effective aid in the preparation and trial of the case". Powell v. Alabama, 287 U.S.45, 71, 53 S.Ct. 55, 65 (1932).

In referring to the rights of an indigent defendant, this Court has noted that "[t]here can be no equal justice where the

kind of a trial a man gets depends on the amount of money he has". Griffin v. Illinois, 351 U.S. 12, 19 (1956)(plurality opinion, Black, J.).

This issue is not limited to equal protection, due process and effective assistance of counsel. Also at stake here are rights guaranteed under the Sixth Amendment to compulsory process to obtain witnesses and confrontation of adverse witnesses. Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L.Rev., 632, 641-643 (1970); accord, Mason v. Arizona, 504 F.2d 1345 (9th Cir, 1974)(indigent accused's right to investigative services at State expense); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980)(new trial required where State denied indigent assistance of a forensic pathologist).

The American Bar Association Standards for Criminal Justice: Providing Defense Services states:

> The plan should provide for investigatory, expert, and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense participation in every phase of the process....
> A.B.A. Standards for Criminal Justice: Providing Defense Services, Vol.I, Chapter V, Standard 5-1.4 at 5-18, 5-19.

The accompanying commentary notes that "[t]he quality of representation at trial ... may be excellent and yet valueless to the defendant if the defense requires the assistance of [a]n ... expert and no such services are available". Id. at 5-20.

Congress has recognized this need by authorizing that funds be provided to indigent defendants for expert services when necessary for an adequate defense. See 18 U.S.C. § 3006(A)(e).

The Mississippi statute involved here - Miss. Code Ann. § 99-15-17 (1979)* makes general provision for re-imbursement of expenses incurred. However, the Mississippi trial court refused to authorize the requested expenditures.

The basis for the denial is two-pronged. The Mississippi Supreme Court stated that the state and federal constitutions do not require that an indigent accused be provided with services other than counsel:

> In Phillips v. State, 197 So.2d 241 Miss. 1967) this court ruled on the necessity of providing [a] criminal defendant with a psychiatric expert:
> Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of counsel. (Emphasis ours)
> Opinion of Mississippi Supreme Court at 9, annexed hereto at "A".

The Mississippi Supreme Court further stated, pursuant to Bullock v. State, 391 So.2d 601 (Miss. 1980),that the denial was justified by counsel's failure to "outline specific costs

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* In relevant part this section provides:
> [T]he judge shall allow re-imbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.
> Mississippi Code 1972 Annotated § 99-15-17 (1983 Supp.)

and in specific terms the purposes and value* of such requested expert ...." Opinion at 9, annexed as Exhibit "A". This Court ought to examine such state grounds to letermine their constitutional perimeters.

Our adversary system of justice functions properly only when both sides have equal access to the tools essential to establishing facts:

> One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct a proper defense.
> Report of the Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice, 45-46 (1963).

From this it "follows that in so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversarial system". Id. at 11.

At the trial, petitioner was unable to cross-examine the ballistics expert and similarly no cross-examination was even attempted with respect to the cast expert. The prejudice flowing from the failure to provide a criminal investigator cannot be measured with such particularity. As part of the accused's right to the effective assistance of counsel, denial had an all persuasive effect on the defense which cannot be isolated by

* Criminal investigators and experts generally work at an hourly rate and therefore it is difficult to project "specific costs". The "purpose and value" of such defense services are obvious. Moreover, defense counsel's affidavit in support of the request for appointment of a criminal investigator stated that the State had informed them of 35 potential witnesses that it might call. The claim that defense counsel failed to comply with the Bullock decision is therefore of questionable merit.

pointing to particular instances. As in other Sixth Amendment areas, a particulariazed showing is virtually impossible. Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978); Glasser v. United States, 315 U.S. 60 (1942).

III. THE PETITIONER'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE PROSECUTOR'S COMMENTS THAT OF ALL THE DEATH CASES HE HAD TRIED, THIS ONE DEMANDS DEATH MORE THAN ANY OF THE OTHERS

The prosecution rebuttal comments, wherein comparison was made of this case with all the other death cases tried by the prosecutor,was highly improper. A similar argument was made in Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984) and led to reversal. The prosecutor there argued how infrequently in his years of experience the death penalty was requested, inferring thereby that when it is requested it is warranted:

> I've been here a number of years in the District Attorney's Office and I've tried a number of cases, many cases as a matter of fact, and the death penalty is seldom requested in Columbus, it's very infrequently requested. And since I've been here, it's been requested as a matter of fact, in the five years I've been here, something less than a dozen times. It's not very often that we come in here and ask you to bring in a verdict of a death sentence on an individual.
> Tucker v. Zant, supra, 724 F.2d at 889.

In reversing the sentence phase of the bifurcated trial there, the Court of Appeals stated:

> Such arguments are objectionable because their effect is to assure the jurors that someone with greater experience had already

made the decision that the law imposes on them. The statement invites the jury to rely on the prosecutor's office's conclusion that the defendant is deserving of death rather than to make its own evaluation of the enormity of the defendant's crime. Ibid.

The remarks of the prosecutor here are more flagrant, and therefore were far more prejudicial on the jury's deliberations:

> I think the course is clear. I have tried cases where the death penalty has been imposed by juries, even in this very Courtroom. I've tried cases, even in this Courtroom, where I asked for the death penalty and the jury didn't give it. But never ever, ladies and gentlemen, have I ever tried a case where the facts and circumstances surrounding the case call out for and demand the death penalty -- never -- I assure you on my word, that I have never ever tried a death penalty case in the Courthouse or any other place, where the penalty is more apparent and called for (685).
>
> Remarks of prosecutor on rebuttal summation, annexed at Exhibit "B".

The duty of the prosecutor is "to seek justice, not merely to convict". American Bar Association Standards of Criminal Justice: The Prosecution Function § 3-1.1(c). In argument to the jury, it "is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence on the guilt of the defendant. American Bar Association Standards, supra, at § 3-5.8(b). Moreover, by so doing the prosecutor made himself an unsworn witness in violation of the petitioner's Sixth Amendment right to confront his accusers. This Court, long ago, recognized that "while he [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones". Berger v. United States, 295 U.S. 78, 88 (1935).

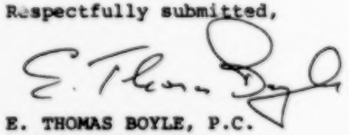
The remarks of the prosecutor on the particular appropriateness of the death penalty here devastated any opportunity for a fair consideration on that issue. While defense counsel below made no timely objection, the Court has recently granted certiorari to review a reversal based on prosecutorial remarks not objected to by defense counsel at trial. United States v. Young, F.2d , (10th Cir. 1983), cert. granted 52 U.S.L.W. 3596 (February 21, 1984)(No. 83-469). Review should be granted here.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated: April 18, 1984
Smithtown, New York

Respectfully submitted,



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EXHIBITS

"A" Opinion of Mississippi Supreme Court

"B" Order, dated February 1, 1984, denying motion for re-hearing

"C" Defense summation at sentence phase of bifurcated trial

"D" Prosecutor's initial summation at sentence phase

"E" Prosecutor's rebuttal summation at sentence phase

"F" Motion for appointment of investigator and ballistics and fingerprint experts

"G" Order, dated September 9, 1981, denying request for appointment of investigator and experts

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,285

BOBBY CALDWELL

V.

241 A

STATE OF MISSISSIPPI

EN BANC

DAN LEE, JUSTICE, FOR THE COURT:

PART I

THE GUILT PHASE

This is an appeal from the Circuit Court of DeSoto County wherein the appellant, Bobby Caldwell, was found guilty of the capital murder of Elizabeth Faulkner and sentenced to die in the gas chamber.[1] Upon motion of the appellant, the venue of the trial was changed from Panola County to DeSoto County. The trial court set the date of execution as January 15, 1982. Caldwell brought this appeal and assigns as error the trial court's actions in:

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[1] PART I, the guilt phase of this opinion, is written by Dan Lee, Justice for the Court, joined by all other Justices except Justice Hawkins, who recused himself from the case.

PART II, the penalty phase of this opinion, is written by Broom, Presiding Justice, joined by Walker, P.J., Roy Noble Lee and Bowling, JJ. Dissent by Dan Lee, Justice, joined by Patterson, C.J., Prather and Robertson, JJ. Hawkins, J. not participating. Being a 4 - 4 tie the death penalty is therefore affirmed.

1. denying defendant's motion to declare the warrantless arrest illegal in that evidence of another crime was admitted; no probable cause existed at the time of arrest; appellant was not informed of his arrest; the trial court's ruling on the motion was against the weight of the evidence;

2. denying defendant's motion to suppress the alleged statement, in that the ruling is against the weight of the evidence;

3. denying the defendant's motion for a special investigator and ballistic expert at state expense, which violated defendant's due process of law;

4. the state failed in proving venue in that Panola County, Mississippi, has two judicial districts.

Mr. Robert Faulkner and Mrs. Elizabeth Faulkner were husband and wife. Together they owned Mrs. Lee's Bait Shop, a small grocery store and bait shop on Highway 315 near Sardis Reservoir in Panola County. On the morning of October 29, 1980, Mrs. Faulkner was in the store and her husband was in the back part of the building which served as the couple's living quarters. Mr. Faulkner testified that he heard his wife scream and then two shots fired. He took a shotgun and went to the door which separated the living quarters from the store. From there he saw a black man dressed in dark clothing and a dark toboggan-style hat running out of the store. Mr. Faulkner went through the store and saw his wife lying on the floor behind the counter. He then ran out of the store and fired his shotgun twice at the fleeing assailant. The second time he fired the assailant was jumping over a barbed wire fence and running into a wooded area. Mr. Faulkner then returned to his wife and called an ambulance for her.

The Faulkner's daughter-in-law lived next door to the store. She came over immediately and called the Panola County Sheriff's Office. Deputy J. C. Sexton arrived approximately twenty minutes later. He was told what direction the assailant ran, whereupon he immediately followed on foot. When Deputy Sexton reached the barbed wire fence he found a right handed

brown cotton glove stuck on a barb. Crossing the fence, Sexton found fresh boot prints in the mud and followed them approximately .25 miles to a logging road right off of the highway. Sexton testified that the boot tracks ended by some fresh tire tracks. The car was gone but mud on the road indicated the direction it traveled.

The Panola County Sheriff, David Bryan, ordered that roadblocks be set up throughout the area. Officers at the roadblocks were given a description of the suspect and told he was driving a red and white Malibu or a Chevelle. Shortly thereafter Sheriff Bryan received word that a man matching the suspect's description had passed through at least two roadblocks in a red and white car. At the roadblocks the suspect was identified as the appellant, Bobby Caldwell. The sheriff then instructed Deputies Sexton and Rudd to bring Caldwell in for questioning.

Sexton and Rudd immediately went to Caldwell's parents' home where they found Caldwell washing a red and white Chevrolet. Caldwell was dressed in dark coveralls, toboggan hat and rubber boots. Deputy Sexton testified that Caldwell's boot tracks in the mud around the car matched those he had followed in the woods a few hours earlier. The officers told Caldwell that they wanted him to accompany them to the Batesville jail because the Sheriff wanted to talk to him. Caldwell started toward the open door on the driver's side of his car when Deputy Sexton noticed the handle of a pistol partially exposed under the car seat. Sexton ordered Caldwell to "Woap, hold it right there" and Deputy Rudd handcuffed him. Sexton retrieved the pistol and determined that it had four (4) live rounds and two (2) spent cartridges in it.

Caldwell was taken to the Batesville jail between 10:00 a.m. and 11:00 a.m. the morning of the shooting. A search of his clothing revealed a left handed brown cotton glove

similar to the one found on the fence. Caldwell was given his rights and he denied any involvement in the shooting. He was then placed in a lineup and identified by Mr. Faulkner as the assailant.

The following morning Caldwell asked to speak to Deputy Rudd. Rudd and Sheriff Bryan then interviewed Caldwell and from that interview emerged a three page statement in which Caldwell admitted shooting Mrs. Faulkner while attempting to rob her store. The statement is in the sheriff's handwriting and is not signed by Caldwell. Caldwell denied ever having made the statement. Following the statement Caldwell was formally arrested and charged with Mrs. Faulkner's murder.

The proof at trial included Mr. Faulkner's in-court identification of Caldwell as the assailant, Caldwell's statement, and several expert witnesses who testified that the boot tracks, tire tracks, and ballistic comparisons all corresponded with Caldwell's boots, tires and weapon confiscated from his car. The jury found Caldwell guilty. The same jury also imposed the death penalty.

Caldwell's first assignment of error groups together four different arguments: (1) the admission of evidence of other crimes during the hearing on the legality of his warrantless arrest. (2) the lack of probable cause to make an arrest, (3) the failure to inform him of his arrest, and (4) the court's error in weighing the evidence. Although lumped together under one assignment of error, we will discuss each of these arguments separately so as to avoid confusion.

At the time Sheriff Bryan directed Deputies Sexton and Rudd to bring Caldwell in for questioning, the sheriff suspected that he was involved in an attempted robbery of a package store. The package store robbery occurred on October 20, 1980, just nine days prior to Mrs. Faulkner's murder. Sheriff Bryan had information from witnesses to the attempted package

store robbery, that the suspect was a black male in his early to mid twenties and drove a two tone red car which had been shot in the trunk during the attempted robbery. The sheriff later received information that a car matching the description of that used in the attempted robbery had been at a local convenience store and had a recently patched and painted hole in the trunk. The information also included the car's license tag number, PAN 777. A check on that tag revealed the car was registered to Caldwell's father, Dempsey Caldwell, Sr. Using this information, Sheriff Bryan discovered that Caldwell was on work release from Parchman and had not been at work the day of the attempted robbery of the package store. Sheriff Bryan had ordered Deputy Rudd to locate Caldwell but these efforts had been futile. When Deputies Sexton and Rudd arrived at the home of Caldwell's father, after Mrs. Faulkner's shooting, the red and white car Caldwell was washing had a patch on the trunk and had been freshly painted.

In the hearing on Caldwell's motion to declare the warrantless arrest illegal and to suppress evidence obtained therefrom, the judge allowed all of the foregoing testimony regarding the attempted package store robbery. Caldwell argues that evidence of other crimes was inadmissible during this hearing. His position is that the evidence was irrelevant to the purpose of the hearing - determining whether probable cause for his arrest existed. It is a settled rule in Mississippi that proof of a crime distinct from that alleged in the indictment is generally inadmissible at the accused's trial on the merits. Eubanks v. State, 419 So.2d 1330 (Miss. 1982). The rationale for this rule is that evidence of other crimes may tend to prejudice the minds of the jurors or confuse them as to the real issues on trial.

In the instant case, there was no possibility that the evidence would prejudice the jury because the evidence was

taken during a suppression hearing before a jury had even been impaneled. In Brooks v. State, 242 So.2d 865 (Miss. 1971), this Court held that the "acid test" is the relevancy of the evidence to the purpose or purposes for which it is sought to be introduced. The relevancy here must relate to probable cause for the arrest. Certainly the fact that the law enforcement officers considered Caldwell a suspect in another recent similar crime involving an attempted robbery was relevant to their suspicion and he was involved here, particularly so when descriptions of the suspect and get-away cars were identical. Because there was no jury at this hearing the policy considerations designed to prevent prejudice do not apply to this evidence and its admission was not error.

Did probable cause exist at the time of Caldwell's arrest? In Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), the United States Supreme Court stated that "probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." 443 U.S. at 37, 99 S.Ct. at 2632, 61 L.Ed.2d at 350. In Powe v. State, 235 So.2d 920 (Miss. 1970), this Court set forth a two-pronged test to determine probable cause. The arresting officer must first have reasonable cause to believe a felony is being committed and secondly, must have reasonable cause to believe that the person proposed to be arrested is the one that committed it. Reasonable cause to believe a suspect has committed a crime does not require evidence sufficient to support a conviction. Powe, supra. Caldwell concedes the first part of this test but he argues that there was not reasonable cause to believe that he had committed the crime.

The evidence at the hearing shows that Officers Sexton and Rudd had ample cause to reasonably believe Caldwell committed the crime. Caldwell matched the description the officers had for the suspect as related to both physical description and wearing apparel and he was washing a car that matched the description of the vehicle involved. Also, Officer Sexton recognized Caldwell's boot print as identical to those he followed through the woods behind the bait shop. At the time of the arrest the officers also had information that Caldwell had passed through at least two roadblocks in the area of the crime. We hold that that information was sufficient to give the officers reasonable cause to believe Caldwell was involved in the crime.

Was Caldwell adequately informed of his arrest? Sheriff Bryan testified that Caldwell was not officially arrested until after he gave the statement on October 30, almost 24 hours after being taken into custody, although he was informed of his rights prior to that. In the case of Hinton v. Sims, 171 Miss. 741, 158 So. 141 (1934), this Court ruled that an arrest was illegal where the arresting officer failed to notify the suspect he was under arrest. In Hinton, we said:

> Although the evidence showed that Hinton knew Sims and Myers, and knew that they were deputy sheriffs, it was the duty of Sims to inform him to consider himself under arrest, or by some other language convey to Hinton the idea that he was attempting to arrest him. Instead of doing that, he used the language of a highwayman, "Put up your hands." And, by the way, during these times it is well known that some officers of the law have turned bandits. If it had been shown that Hinton was a desperate and dangerous criminal, a well-known killer, or a would-be killer, Sims might have been justified in proceeding as he did. Gurley v. Tucker (Miss.) 155 So. 189. Must every man, innocent or guilty, put up his hands whenever commanded to do so by an officer, whether in the daytime or nighttime, and regardless of the situation

> and surroundings, without being informed by the officer of the reason for the command? We think not. We do not mean to convey the idea that the officer must always inform the person sought to be arrested of the object and cause of the arrest before it is made, but we do hold that, except in rare cases, such as referred to in the Gurley Case, he should inform him that he consider himself under arrest.

171 Miss. at 747, 158 So. at 143. Caldwell meets the requirement of the Gurley exception as a desperate and dangerous criminal. Also, the fact that he was under arrest was certainly obvious to Caldwell as he was not free to leave the Batesville jail, was informed of his rights and of the fact that the sheriff wanted to question him regarding a murder. These facts read together indicate that Caldwell was well aware of his arrest prior to being notified thereof. As Caldwell was given his rights and knew that he could request an attorney, the failure to expressly inform him of his arrest on October 29 was not a reversible error. Based on all the foregoing, it cannot be said that the trial judge's ruling at the suppression hearing was against the overwhelming weight of the evidence.

Caldwell's second assignment of error is the trial court's failure to suppress the alleged statement. Here it must be noted that Caldwell does not contend that the statement was illegally obtained, rather he argues that it was never made. This Court has held that when there is a conflict as to whether an accused actually gave a statement the resolution of such conflict is for the jury. Talbert v. State, 347 So.2d 352 (Miss. 1977). In Talbert this Court held:

> The true rule, as applied by the trial court in this case, is found in Weathers v. State, 237 So.2d 441 (Miss. 1970). In that case, the police officer testified that a confession had been made, and the defendant claimed that it had not. We held, "The conflict between Weathers and the officer as to whether Weathers had, in fact, made the statement attributed to him created a factual issue, the resolution of which lay peculiarly within the province of the jury." Id. at 442. Thus, the court properly admitted

> the testimony of Deputy Sheriff Nail regarding Talbert's confession. The jury was free to decide whether the statement had been made, and to decide what weight to give it.

347 So.2d at 355. Therefore, based on Talbert, the statement was properly admitted and it became a question for the jury as to whether Caldwell ever made such statement.

Caldwell's third assignment of error contends that the refusal of the trial court to grant his motion that he be provided with an expert in the field of ballistics and an investigator was a denial of due process. Prior to the trial Caldwell filed a motion for an order that he be provided with psychiatric and ballistic experts at state expense. The trial court granted the motion as to the psychiatric expert but denied the ballistic expert. In Phillips v. State, 197 So. 2d 241 (Miss. 1967) this Court ruled on the necessity of providing criminal defendant with a psychiatric expert:

> Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they requre is the assistance of legal counsel. (Emphasis ours)

197 So.2d at 244. In the case of Bullock v. State, 391 So.2d 601 (Miss. 1980), this Court went further to say that the failure to outline specific costs and in specific terms the purposes and value of such requested expert rendered the trial court's refusal to authorize such expenditure non reversible. In the instant case Caldwell's motion simply included the general statement that the requested expert "would be of great necessarius witness." It did not estimate the cost of such expert nor the specific value. Therefore, the trial court's failure to provide the requested expert witness or investigator did not constitute reversible error.

Caldwell's final assignment of error as to the guilt phase is that the state failed to prove venue of the crime. This contention is readily disposed of. During the redirect examination of Sheriff Bryan the following exchange between the prosecutor and sheriff occurred:

> Q. Sheriff Bryan, what judicial district, county and state is Mrs. Lee's located in, please?
>
> A. First Judicial District, Panola County, State of Mississippi.

Prior testimony had shown the murder to occur at Mrs. Lee's Bait Shop therefore, venue was established.

Finding no reversible error in the guilt phase, it is affirmed.

PATTERSON, C.J., WALKER, P.J., BROOM, P.J., AND ROY NOBLE LEE, BOWLING, PRATHER AND ROBERTSON, JJ., CONCUR.

HAWKINS, J., NOT PARTICIPATING.

PART II

BROOM, PRESIDING JUSTICE, FOR THE COURT:

Defense counsel, in his closing argument, asked on behalf of the defendant "that the rest of his life be spent behind bars". He was suggesting to the jury that should it fix the defendant's punishment at life imprisonment, the effect of such a sentence would be life behind bars without any parole or leniency extended. Having made that statement to the jurors, defense counsel then quoted a poem about "judgment", "mercy", "Our Father in Heaven", "forgiveness", and electrocution. He discussed the Ten Commandments and asked the jurors to judge the defendant "as Jesus would do." Then he again repeated,

> I'm asking you to put him in jail for the rest of his life. He's violated one of the Ten Commandments. "Thou shalt not kill." But, doesn't that apply to us, too? Should we make it our decision to kill someone else? One of the most remarkable phrases I've ever heard was said by a man who was nailed to the cross, who was tortured and just before he died, he said these words, "Father, forgive them for they know not what they do."

(Emphasis added).

Relying upon Howell v. State, 411 So.2d 772 (Miss. 1982); Evans v. State, 422 So.2d 737 (Miss. 1982); Gilliard v. State, 428 So.2d 576 (Miss. 1983); and Edwards v. State (No. 53,800, decided March 16, 1983, but not yet reported), reversal is sought because the prosecutor commented to the jurors that "the decision you render is automatically reviewable by the Supreme Court." Hill v. State, 432 So.2d 427 (Miss. 1983), held that the prosecutor's statement to the jury that their finding would not be the "last word" was procedurally waived for failure of any objection

being made to the argument. In the present case, objection was made but the matter was not assigned as error on appeal here.

Pertinent here, though not precisely analogous on the facts, is the rationale and reasoning of the United States Supreme Court in California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Ramos involved a challenge made to a state jury instruction which told the jury that

> [U]nder the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

___ U.S. ___, 103 S.Ct. at 3450; 77 L.Ed.2d at 1177. On appeal, the California Supreme Court held that the jury instruction required reversal because it violated the eighth and fourteenth amendments for inviting the jury to consider factors foreign to the task of deciding whether the defendant should live or die, and injected an entirely speculative element into the capital sentencing determination. It also held that reversal was warranted because the instruction left the jury with the mistaken belief that the only way to keep the defendant off the streets was to sentence him to death.

We note here that defense counsel's closing argument for Bobby Caldwell in the present case stated that the jury should effectively remove Caldwell from society forever by giving him a sentence of life imprisonment. This is an obvious inaccuracy and misstatement of the law because there is almost always a possibility of parole

in every case, except cases involving persons convicted and sentenced as habitual criminals.

Clearly, Ramos leaves the state with the prerogative to determine whether juries should be informed of sentencing alternatives such as parole or commutation of a sentence. By the same reasoning, states may decide whether it is error to mention to jurors the matter of appellate review, which review is mandated by our statute: Mississippi Code Annotated §99-19-105 (Supp. 1982). On this basis, we think, upon the facts of this case, reversal is not warranted merely because the jurors during the sentencing phase were told that death penalty trials are subject to appellate review by this Court.

Again it is pointed out that it was here in the present case, during defense counsel's argument, that he inaccurately sought to convince the jury that if they meted out a life sentence the defendant would remain in prison the remainder of his life. He left them with the impression that there would be no parole or commutation of sentence. He emphasized his pitch for mercy by referring to the Ten Commandments, Jesus and the Heavenly Father. In this context, and upon the cogent evidence of the defendant's guilt, we do not think the punishment phase should be reversed merely because the prosecutor (subsequent to the defense argument) and then the judge truthfully and accurately stated that the sentence of death would be automatically reviewed by a higher court.

Evidence of the defendant's guilt is overwhelming in the present case and it cannot be said that any injustice would occur by affirmance. Here it appears upon the whole record that the defendant's guilt of an extremely

calloused and senseless murder has been established beyond all reasonable doubt. Indeed, the evidence of guilt is not even close but is absolutely overwhelming. Further, the evidence clearly establishes that his past criminal record includes four convictions of felonies involving the use of threat or violence to another person.

Prueitt v. State, 261 So.2d 119 (Miss. 1972), is a case in which we dealt with the situation where counsel sought to argue a question not raised by the assignment of error. Writing for the Court in that case, Justice Jones states "We do not deem these matters [those not assigned] plain error ... ." Bell v. State, 360 So.2d 1206 (Miss. 1978), although I dissented because I deemed the record tainted with so many serious errors as to render the trial an improper basis to affirm the death penalty, is analogous to the present case, in that Bell dealt with errors "not urged or argued in the briefs ... ."

This case is factually distinguishable from Howell, Evans, Gilliard, Edwards and Hill, supra. While the error complained of here was not invited to the extent that the reviewability of death penalty cases was mentioned first by defense counsel, defense counsel sought to leave the impression that a life imprisonment sentence would absolutely leave the defendant behind bars the rest of his life.[2] Upon the evidence and posture of this record, reversal is not warranted.

As required by Mississippi Code Annotated §99-19-105, (Supp. 1982), we have carefully reviewed the entire record including the sentencing phase of the trial. We find that no influence of passion, prejudice, or any other arbitrary factor influenced the jury in its imposition

[2]To that extent, the response of the prosecutor was invited.

of the death penalty. The jury's finding the aggravating circumstances: that the murder was committed while the defendant was engaged in the commission of robbery or attempted robbery, that it was committed for pecuniary gain, that it was especially heinous, atrocious, or cruel, and that the defendant was previously convicted of four felonies involving the use of threat or violence to the person, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" was supported beyond a reasonable doubt by the evidence. We think the evidence clearly justifies the death penalty.

As §99-19-105 requires, we have reviewed the cause including all motions, pleadings, requests and jury instructions. Appropriate guidance was given the jurors during all phases of the trial. Comparison of this case with other cases in which the death penalty has been imposed and upheld establishes that such penalty is not wanton, freakish, excessive, nor disproportionate to the sentence imposed in such cases. See Appendix "A" attached. Execution of defendant Bobby Caldwell would be consistent and even-handed with all the post-Jackson death penalty cases previously affirmed by us. Caldwell received a fair trial in all respects. Our examination of the record reveals no reversible error and no such error has been established by the briefs or oral argument. Therefore, we must affirm.

AFFIRMANCE is ordered, and Wednesday, the 21st day of December, 1983, is fixed as the date on which the death sentence shall be executed, as provided by law.

AFFIRMED.

WALKER, P.J., ROY NOBLE LEE AND BOWLING, JJ., CONCUR AS TO PART II. DAN LEE, J., PATTERSON, C.J., PRATHER AND ROBERTSON, JJ., DISSENT. HAWKINS, J., NOT PARTICIPATING.

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

Irving v. State (No. 54,358, decided August 24, 1983, but not yet reported).

Tokman v. State, 435 So.2d 664 (Miss. 1983).

Leatherwood v. State, 435 So.2d 645 (Miss. 1983).

Hill v. State, 432 So.2d 427 (Miss. 1983).

Pruett v. State, 431 So.2d 1101 (Miss. 1983).

Gilliard v. State, 428 So.2d 576 (Miss. 1983).

Evans v. State, 422 So.2d 737 (Miss. 1982).

King v. State, 421 So.2d 1009 (Miss. 1982).

Wheat v. State, 420 So.2d 229 (Miss. 1982).

Smith v. State, 419 So.2d 563 (Miss. 1982).

Edwards v. State, 413 So.2d 1007 (Miss. 1982).

Johnson v. State, 416 So.2d 383 (Miss. 1982).

Bullock v. State, 391 So.2d 601 (Miss. 1980).

Reddix v. State, 381 So.2d 999 (Miss. 1980).

Jones v. State, 381 So.2d 983 (Miss. 1980).

Culberson v. State, 379 So.2d 499 (Miss. 1979).

Gray v. State, 375 So.2d 994 (Miss. 1979).

Jordan v. State, 365 So.2d 1198 (Miss. 1978).

Voyles v. State, 362 So.2d 1236 (Miss. 1978).

Irving v. State, 361 So.2d 1360 (Miss. 1978).

Washington v. State, 361 So.2d 61 (Miss. 1978).

Bell v. State, 360 So.2d 1206 (Miss. 1978).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Dycus v. State (No. 53,840, decided August 10, 1983, but not yet reported).

Edwards v. State (No. 53,800, decided March 16, 1983, but not yet reported).

Coleman v. State, 378 So.2d 640 (Miss. 1979).

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,285

BOBBY CALDWELL

V.

STATE OF MISSISSIPPI

241 B

DAN LEE, JUSTICE, DISSENTING AS TO PART II:

Certainly the most solemn and portentous duty any state may require of its citizens is to serve as a juror in a capital murder trial. Not even the role of executioner can be said to require greater introspection, for the executioner is not required to decide fate, but only to implement the decisions of others. Only the hearts and minds of the jurors may impose that ultimate punishment by unanimously agreeing that an accused has committed such an atrocious act as to warrant the taking of his life. The gravity and uniqueness of the death sentence require that jurors in a capital case view their role with particular importance, and fairness to the accused dictates that nothing occur at trial which lessens or diminishes the jurors' perception of their responsibility. Because I believe that the remarks by the prosecutor and trial judge concerning appellate review had this effect, I respectfully dissent from Part II of the majority's opinion.

The majority relies on California v. Ramos, ___U.S. _____, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), yet they acknowledge that Ramos leaves the decision of whether to inform the jury of extraneous matters with the individual states. This Court has made it plain that comments such as occurred in this trial constitute reversible error in Mississippi. In Howell v. State, 411 So.2d 772 (Miss. 1982), we held that a prosecutor's argument which informed the jury that the verdict was subject to a right of appeal constituted reversible error. The logic of this rule is beyond question. Comment of this nature has the effect of lessening a juror's sense of responsibility for the fate of the accused. Those jurors who are not convinced that a defendant's life should be taken may not argue so strongly or hold their position when they are led to believe that a reviewing court will correct a mistake in their judgment.

In the instant case the error went far beyond that in Howell. In Howell the prosecutor repeatedly ignored the trial court's ruling that his comments concerning appellate review were improper. Here the prosecutor's comments went so far as to not only lessen the jury's sense of responsibility but to practically remove it altogether. The prosecutor argued:

> Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . . (emphasis added)

At this point the defense counsel objected and the prosecuting attorney responded:

> Your Honor, throughout their argument, they said this Panel was going to kill this man. I think that's terribly unfair. (emphasis added)

The trial court then compounded the error with a ruling that crowned it with a false halo of propriety:

> All right, go on and make the full expression so the jury will not be confused. I think it is proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused. (emphasis added)

The prosecuting attorney then made his "full expression." He argued that defense counsel had insinuated

> that your decision is the final decision and that they're going to take Bobby Caldwell out in the front of this courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.

A reading of the prosecutor's comments coupled with those of the trial judge could certainly give a juror the impression that the jury's decision was nothing more than window dressing. Not only did those comments reduce the jury's sense of responsibility, they were factually inaccurate. A jury should not be told that they are not "going to kill this man" if they decide to impose the death penalty. The purpose of a bifurcated trial is to insure that it is indeed solely the jury that condemns an accused to die and that they have no partners in the exercise of that awesome responsibility. Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness. When a jury is faced with so solemn a task as deciding whether to impose the death penalty we must not allow their sense of responsibility to weaken. In my view the majority's opinion takes a step backward from Howell, a step which I feel is misguided.

The majority's opinion fails to make it clear just why the remarks in question are not reversible error, although

two possible alternatives are discussed; invited error and failure to raise the issue on appeal. Apparently the majority has decided that defense counsel invited error by arguing that the jury should sentence Caldwell to life imprisonment. Here the majority's position fails in two regards. First, because the statute provides only two possible sentencing alternatives, life imprisonment or death, defense counsel has little choice but to plead that his client be sentenced to life imprisonment. Section 99-19-101 Miss. Code Ann. (Supp. 1983). It is a twisted bit of logic indeed that denies a defendant's counsel the right to argue the only statutory alternative to death without calling that argument an invitation to error. Secondly, the concept of invited error fails because it is simply inapplicable to the facts of this case. Assuming without accepting the majority's position that the defense counsel's argument invited errpr, it certainly did not invite this error. Asking the jury to show mercy does not invite comment on the system of appellate review. This is true whether the plea for mercy discusses Christian, Judean or Buddhist philosophies, quotes Shakespeare or refers to the heartache suffered by the accused's mother. The plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy. Therefore, the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die. Defense counsel's plea for Caldwell's life did not invite the comment in question.

The only other basis in the majority opinion for refusing to find that the comment was reversible error is a brief mention that an objection was made but that it was not

assigned as error on this appeal.[1] In Hill v. State, 432 So. 2d 427 (Miss. 1983) we reaffirmed Howell and held that comments of this nature are "clearly erroneous and would ordinarily be highly prejudicial." 432 So.2d at 439. In Hill, unlike the present case, there was no contemporaneous objection to the prosecutor's comments. We refused to reverse Hill because of the difficulty of distinguishing between trial tactics and simple failure to object. Here we are not faced with that problem. The failure to assign the matter as error could in no way be called a deliberate trial tactic. Surely we will not send a man to the gas chamber because his attorney failed to address an obvious error. We have repeatedly held that we give a heightened review in capital cases. Laney v. State, 421 So.2d 1216 (Miss. 1982); Irving v. State, 361 So. 2d 1360 (Miss. 1978). If the concept of heightened review is to have any meaning it must stand for the rule that we will not allow reversible error to be ignored because of the attorney's failure to raise it. The purpose of heightened review is to insure that a procedural bar does not become a guillotine. I would reverse the sentencing phase of the bifurcated trial and remand for a new trial on sentencing alone.

PATTERSON, C.J., PRATHER AND ROBERTSON, JJ., JOIN IN THIS DISSENT.

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[1] We note that Caldwell's trial counsel is not representing him in this appeal and that his current counsel had no involvement in this matter prior to the appeal.

APR 17 1984

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 1, 1984

ROBERTSON, J.

Misc. #1656 Robert Lee Russell v. Warden, Miss. Dept. of Corrections and the State of Mississippi; Petition for Writ of Habeas Corpus Denied.

55,031 Alvin Culberson v. State; Circuit, Harrison; Amended Motion and Suggestion of Diminution Sustained.

BOWLING, J.

X 54,355 Robert W. Vaughn v. State Farm Mutual Automobile Ins. Co.; Circuit, Washington; Reversed and Remanded.

ROY NOBLE LEE, J.

X 54,723 William Thomas Smith v. State; Circuit, Pontotoc; Conviction of Five Counts of Armed Robbery and Sentences of Life Imprisonment, Sentences to Run Concurrently, Affirmed on Direct Appeal; Cross-Appeal Sustained as to Assignment IX.

54,725 Joseph Carl Brinson v. Betty Lee Brinson; Chancery, Rankin; Affirmed.

53,754 In Re: Connie Ray Evans v. State; Motion to Fix Day of Execution Sustained. Wednesday, February 15, 1984, Set for Execution of the Death Penalty in the Manner Provided by Law.

54,545 Martha H. McIlwain v. Cecil McIlwain; Motion for Award of Attorney's Fees and Costs Sustained in the Amount of $375.00 for Services in this Court.

54,921 Barbara Kaye Bush v. C. Nolon Bush; Motion to Strike Brief of Appellee Overruled. Appellee's Motion for Attorney's Fees Overruled.

55,127 Sarah Elizabeth Wilson v. Phillip E. Wilson; Motion to Strike Opinion and Final Decree Passed for Consideration of the Case on the Merits.

WALKER, P.J.

54,109 Judy Clara Carter Wooten, Karla Jeanne Wooten, By Her Mother and Next Friend, Judy Clara Carter Wooten, and Carl Edward Wooten, Jr., By His Mother and Next Friend, Judy Clara Carter Wooten v. Yazoo Valley Electric Power Ass'n; Circuit, Warren; Affirmed.

54,674 Willie James Stewart v. State; Circuit, Sunflower; Denial of Complaint against Eddie Lucas, et al. Affirmed.

PATTERSON, C.J.

53,945 Frank Gholar v. State; Circuit, Jefferson Davis; Petition for Leave to File Out-of-Time Petition for Rehearing and Motion to Recall Mandate and Record on Appeal Denied.

THE COURT SITTING EN BANC:

54,285 Bobby Caldwell v. State; Circuit, DeSoto; Petition for Rehearing Denied. Walker, P.J., Broom, P.J., Roy Noble Lee and Bowling, JJ., Concur. Patterson, C.J., Dan Lee, Prather and Robertson, JJ., Dissent. Hawkins, J., Not Participating.

PER CURIAM

54,434 James Curtis Taylor v. State; Motion for Leave to Withdraw as Attorney for Appellant Sustained And Indigency Hearing Ordered.

54,721 Garry Lee v. State; Motion for Leave to Withdraw as Attorney for Appellant Sustained and Indigency Hearing Ordered.

54,930 S.M.R.O.D. Inc., Et Al. v. Mississippi Power Company; Joint Motion of Appellants and Appellee to Dismiss Above Appeal Without Prejudice, Pursuant to Settlement Sustained.

54,984 Mississippi Power Company v. George C. Bilbo, Et Al. Hollis O. Mitchell, Et Al. and Charles D. Keller, Et Al; Joint Motion of Appellant and Specified Appellees to Dismiss Above Appeals Without Prejudice, Pursuant to Settlement Sustained.

55,149 Roger White and Joyce White v. Delta Foundation, Inc, Et. Al.; Motion to Appear as Amicus Parties and to File Amicus Curiae Brief Overruled.

55,032 Michael Wayne Miskelley v. State; Motion to Advance Case on Docket Overruled. Motion to Strike Brief of Appellee Sustained, and Appellee Granted 10 days from this date within which to prepare and refile its brief and supplemental abstract, if any, prepared in accordance with Supreme Court Rules.

55,185 In the Interest of R. T.; Motion to Advance Case on the Docket Sustained and Case set for March Calendar.

55,231 John Florence v. State; Motion of Appellant to Dismiss Appeal Sustained.

55,277 Clarence Course v. State; Motion to Substitute Counsel for Appellant Sustained.

55,337 Western Line Consolidated School District, Et Al. v. The City of Greenville, Mississippi; Chancery, Washington; Appellee's Motion to Docket and Dismiss Appeal Overruled.

Misc. #1285A J. D. Gaines v. State; Demands for Post Conviction Relief Denied.

Misc. #1620 Leonardo Brock v. Desoto County Circuit Court; Petition for Writ of Mandamus Denied as Moot.

Misc. #1651 Horace Carter, M.D.O.C. #23624 v. Circuit Judge of Clarke County; Petition for Writ of Mandamus Denied as Moot.

ONLY CASES MARKED "X" HAVE WRITTEN OPINIONS.

Respectfully submitted,

Robert E. Womack, Clerk
Yvonne P. Burnham, D. C.

crime that you have found him guilty of -- the brutal homicide of Mrs. Faulkner. Ladies and gentlemen, that's four good reasons -- that's four good reasons. At this point, the Defendant will be permitted to argue through counsel. Please listen attentively, and at the conclusion of their remarks, I will close and I am sure that you will be happy to learn that that will be the last lawyer you will hear. Please listen attentively to what the defense attorneys have to say and I anticipate that my remarks on closing will be brief.

COUNSEL FOR DEFENDANT (Mr. Horan): If it please the Court, and Mr. Williams, and ladies and gentlemen of the Jury. Mr. Williams has summarily told you what this is all about. In awhile, you will have to make a decision, whether or not to either spare the life of the Defendant or pronounce the ultimate verdict in our judicial system. Just briefly, Mr. Williams has expounded on Mr. Caldwell's prior records and we cannot in any way dispute that. Let's talk about, for a moment, or reason together for a moment, before you finally make up your mind as to what verdict you will render in this case, the matter that he talked to you about that occurred in Yalobusha County. The Defendant was sentenced to a term of 8 years and that was to run consecutively with a sentence that he mentioned that occurred in

Panola County, and the matter in Panola County was a 8 year term, and this sentence was to run concurrently with another matter, one Cause being 3418 and the other matter being 3417 for an 8 year period. In Cause No. 3417 reflects that said sentence shall run together with the Quitman County matter. Mr. Williams, who has held up these four aggravating circumstances, was in all of those negotiations and not one time did he ever ask for the ultimate penalty or life imprisonment for all those atrocious crimes that he says were committed, but, he comes today and now holds up these things and tells you to bring in the ultimate penalty, that is, death. Now, you have found the Defendant guilty of capital murder. That is gone and that issue has been decided, so, you can consider these things in mitigation, but I also want you to consider why the State of Mississippi was so lenient then. There were armed robberies, of course, a life was not taken in any of those cases. Now, there is nothing that we can do to bring Mrs. Faulkner back to life. There is not one thing that we can do. She met an untimely death for which I am very, very sorry. If I had the power, and I am sure, if you had the power, you would restore her life, but in taking the life of another human being justify, is that -- what is it gonna take to prevent a thing like this happening ever again? I say "No, it's not." From the beginning of this trial, when I first learned about this case, when I was first appointed, Mr. Crow and I appointed to represent the Defendant, we knew all the facts or learned all the facts about this case, what had transpired throughout Bobby Caldwell's life. We knew that finally Mr. Williams would stand

before you or the District Attorney would stand before you and wave all these prior convictions in aggravation, that we could not prevent that. These were crimes of -- that he has waved before you and held them up and asked you to bring in the ultimate penalty of death for Bobby Caldwell. I want you to consider the light sentences that were imposed in these pleas, most of which were pleas of guilt entered by Bobby Caldwell. Now, the Court tells you that you can consider in mitigation the age and the character and the other things, other than the mitigation, the proof in mitigation that we offered yesterday on the issue of penalty. In the beginning, we told you that we were going to be honest with you on all the proof that we could possibly put on. I think it's understandable that we were put at a disadvantage by Mr. Bobby Caldwell for the most part in 1975 -- has been in the State penitentiary. He has been there since the incident of October 29, 1980. Now, what we are asking and what we are seeking from you is that you spare Bobby Caldwell's life I believe that every life is precious. God's most precious gift and I'm not taking -- I'm not trying to in any way trying to tell you that Mrs. Faulkner's life was not precious. It was precious to her family and her friends and relatives. But, consider the act that you have found Mr. Bobby Caldwell guilty of, cannot restore that precious life. That is over. You can spare Bobby Caldwell's life. You have the power to do that. If you send him to

Parchman and there let them drop that cyanide pill and snuff out his life, what have you done for Mrs. Faulkner? You have used your power to remove from the face of this earth a human being. As I stated before, every life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So, I implore you to think deeply about this matter. It is his life or death -- the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. I know Mr. Williams is going to have the final say to you and he is going to say to you, I imagine, I do not know what he's going to say, that he's going to say to you that Bobby Caldwell did not show Mrs. Faulkner any mercy, when he shot her twice and snuffed out her life. I'm sure he's going to say to you that Bobby Caldwell is not a merciful person, but, I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. I am told that in some countries, this is the law. In the Arab countries, in Iran and Iraq, if you, from my understanding, if you steal a man's money, they take your hand. They believe in a different rule of law in that society than we do in America. That there is mercy in our judicial system and that there is possibility for rehabilitation. In the Arab countries, Iran, Iraq,

they take a life for a life, but not necessarily so in these United States. In 1972, the United States Supreme Court said that to kill a person, by execution or gas or whatever, was cruel and inhuman, but later on they have modified that, as Mr. Williams will probably advise you, so, consider all of these things -- consider all the alternatives that you have, for and on behalf of Mr. Caldwell. You are the judges and you will have to decide his fate. It is an awesome responsibility, I know -- an awesome responsibility. This has been the most -- probably one of the most difficult cases that I have ever had to represent. It has been a trying time for me for the last several motnhs. I tried to think of something to say to the 12 men and women that would decide Bobby Caldwell's fate. To try to think of something to report to you a reason for sparing his life. This has been awesome for Mr. Crow and I in someway to persuade you that there is some hope for Bobby Caldwell. To implore you -- in some way to convience you that life in prison -- life in prison at Parchman, Mississippi, would be the appropriate punishment for Bobby Caldwell. To me, in my thinking, imprisonment for life is certainly the next thing to death. The life sentence is the next thing to death. The Court tells you that it's the next sentence to death. That's the only thing that remains in a life sentence of imprisonment is that there is hope for the salvation of the soul, that some good will come out -- will come out of a life that has committed the crime that y'all have said that he has done, so, I implore you to find it in your hearts and minds to spare the life of Bobby

Caldwell. Heed his mother's plea to spare her son's life. Thank you. At this moment, with the Court's permission, I would like the Defendant to make a brief statement to the Jury.

(At this point in the proceedings, the Defendant, Bobby Caldwell, made a brief statement to the Jury. No notes of closing arguments were made, and the Defendant's statement was unintelligible and almost inaudible on the tape. Presently, the following proceedings take place.)

COUNSEL FOR DEFENDANT (Mr. Crow): Ladies and gentlemen of the Jury, when we started this trial Tuesday, I stated that sometime during this week, you'll be called upon to make one very important decision, probably one of the most important decisions of your life. That is whether to spare the life of another person or kill him, and that's what you'll decide. It's a hard decision. I'm glad I'm not in your chair. What has happened, needless to say, is very terrible. What Bobby Caldwell did is by no means excusable, and he should be severely punished for it. It's a terrible thing when a person's life is taken. He stands before you today and asks that you spare his life. He asks that the rest of his life be spent behind bars. An inmate in the Georgia State Prison wrote a poem and I'd like to read it to you. He titled it "Judgment". It starts off and says, "I prayed and prayed. I've asked the Lord if he judged my trial. When asked for mercy, would he remain cold? Would he make me walk that

last mile? Would he be ashamed of my lifeless burned body? A deed he could have easily stopped. If He were the Judge who sentenced me, could he have chose death? No, I think not. Do you actually believe our Father in Heaven hates me and doesn't care? Do you actually believe he delights in my death and destroyed me in the electric chair? I see in your hearts, you know it's not true, but there's a weakness, a lust for revenge. If Jesus felt this way toward you, forget Heaven, no one could get in. Yet I understand and know how you feel because I feel the pain of innocent life lost and parentless children. My soul cries out full of shame. We're all God's children. We care, honor and love, forgiveness, and we have mercy, too. Forgive my mistake. Lend me your hand. Please judge me as Jesus would do." Six hours after he wrote this, he was electrocuted. Now, I'm not standing here before you asking you to forgive this man for what he's done. It's impossible. I can't do that. I'm asking you to put him in jail for the rest of his life. He's violated one of the Ten Commandments. "Thou shalt not kill." But, doesn't that apply to us, too? Should we make it our decision to kill someone else? One of the most remarkable phrases I've ever heard was said by a man who was nailed to the cross, who was tortured and just before he died, he said these words, "Father, forgive them for they know not what they do."

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Ladies and gentlemen, we are at the point now where you've heard all the proof on the issue of punishment. You've heard the instructions of law that you must apply to the facts that came out during the sentencing phase of this trial, and now, as in the first part of the trial, the attorneys are permitted to summarize what we think is important on the issue of punishment. Of course, the State, having the burden of proof, we are permitted to open and close, with the defense attorneys coming in between. The Court tells you in Instruction S-2, that on the issue of punishment, the State and the Defendant may elect to stand on the testimony and evidence introduced during the first phase of the trial or the parties may introduce additional testimony and evidence as to matters that they think relative to the sentencing. Now, it would not be a waste of your time, but I don't think it would be proper to rehash the facts that came out in the first part of the trial in detail, although I intend to touch on those facts during my arguments. Obviously, from your verdict of capital murder, you found that the State had proved its case beyond a reasonable doubt and that this Defendant murdered Mrs. Faulkner during the commission of robbery or an attempt to commit robbery. I don't want to minimize what was proved in the first part of the case, because, as the Court told you, you can

consider and should consider just exactly what was proved to you in the first part of the trial. Now, you will recall that when we started the sentence phase yesterday, I readopted all of the evidence and the exhibits that were introduced during the first part of the trial as a part of this phase. The only other evidence that the State of Mississippi offered on the issue of aggravating circumstances was four exhibits. Exhibit No. 1: A certified copy of a conviction of this Defendant in the Circuit Court of Quitman County, Mississippi in September of 1975 where this Defendant was convicted of the crime of armed robbery and sentenced to 18 years in the State penitentiary. The second exhibit that the State offered on the issue of aggravation was a certified copy of a conviction of the Circuit Court in Batesville in April of this year where this Defendant was convicted of the crime of attempted armed robbery with a firearm. The third exhibit that the State of Mississippi offered was a certified copy of a conviction of the Circuit Court in Batesville in April of 1981, where this Defendant was convicted of the crime of aggravated assault, and finally, the fourth exhibit was the order that was entered by the Circuit Court in Water Valley in July of this year where this Defendant was again convicted of armed robbery with a firearm. But what you have before you is a person, that is not a first offender. You've got a person with a record literally as long as my arm and the Court tells you

that if you deem those convictions to be elements of aggravation, then you should consider them. Two armed robbery convictions, one attempted armed robbery conviction, one aggravated assault conviction, and, yes, one capital murder conviction. That was the proof that the State offered. You will recall that the Defendant called members of his family and obviously from the testimony that was adduced before you, he comes from a good family. I have no quarrel at all with that. You will recall, first, his father, Mr. Dempsey Caldwell, testified. I have no doubt in my mind that Dempsey Caldwell is a good man. He told you that he has lived in Panola County for some 40 years, he told you that he was married, that he 9 children, the youngest being 15 years old, the oldest being 35. He told you that at the time of the murder of Mrs. Faulkner, that his son, Bobby, was 24 years old. He told you that the Defendant went to the 10th grade, dropped out, that in all respects, he was apparently normal. The only problems that he ever had with his son was over whether or not the Defendant would be permitted to play football. The family, I am sure quite naturally felt, that with the previous injury to his arm, that it would be dangerous for the Defendant to play football, and like most good parents, I'm sure that they put their foot down. At any rate, for whatever reason, Bobby dropped out of school at 16, went to work on the farm, when suddenly, according to his father, he decided evidently that he wanted to do something else. He went in the job service. That didn't suit him.

He came back to Panola County, then went to Chicago, and I strongly suspect, ladies and gentlemen, that's the root of the problem that surrounds Bobby Caldwell. I suspect that had he stayed in Panola County under the supervision of his family, that we wouldn't be here today and Mrs. Faulkner wouldn't be in her grave. But at any rate, he went to Chicago where he stayed for approximately a year and he came back to Panola County in the company of a friend that he had brought from Chicago, and just before he and his friend were to leave to go back to Chicago, they got into trouble, and, ladies and gentlemen, that may be an understatement. There's trouble and then there's trouble, but an armed robbery in Quitman County in my judgment is real trouble. A 19 year old black male from a good family, arms himself and commits robbery at 19. He's caught, he's tried, he's convicted, and he's sentenced to 18 years in 1975. He goes to Parchman and obviously the Department of Corrections decides that he is no longer a risk to society and they release him on Work Release. I make no bones about it, ladies and gentlemen, when someone makes a mistake, and I think you ought to "belly up to the bar" and admit it. I quite frankly think the Department of Corrections made a mistake. I think they made a serious mistake; for, what happens after he's in the penitentiary for 4 years? He gets out on Work Release, comes to Batesville, attempts to hold up a liquor store, commits an aggravated assault, goes down to Yalobusha County, commits an armed robbery and his acts culminate with the brutal, brutal homicide of an innocent woman trying

to make an honest living. Mr. Caldwell told you that he arranged for his son to get a job at the same place he worked -- at Gold Kist. After he was released on Work Release, the Defendant did work for Gold Kist, and I assume was working for Gold Kist when he was robbing and killing. The next witness that defense called was Nancy Edwards, the Defendant's girlfriend. She told you that in July, she had known the Defendant, Bobby Caldwell, for approximately a year. She told you that she met him at a dance or in a club in Lambert, they began to date. He appeared nice -- nice to her, nice to others and their relationship developed to such an extent that they were engaged to be married in November of 1980. She told you that he worked for Gold Kist and apparently was a hard worker because he worked, sometimes at night and sometimes at day -- alternating shifts. You will recall that I only asked her a few questions on cross examination, and she testified that she had seen this gun before. Here's a convicted felon carrying a firearm. They go out with this firearm and they target practice -- or he target practices. She said to my question about whether he became fairly accurate with the gun that, "sometimes he would hit 'em and sometimes he wouldn't." The next witness that the Defendant called was his sister, Shirley Rushing. She told you that she lives over around Sledge -- west of Sledge and that during her childhood years, that the family was a close-knit family. That when the Defendant was home as a child that they lived

on a farm and had the chores to do, and did the chores and worked hard and the brothers and sisters were close in the family. She detailed Bobby's life as he came up through school. When he quit school. Where he went. She told you about his trip to Chicago. She told you when he came back, he got in trouble and she affirmed what the proof had already shown that when this Defendant committed this crime and the other crimes, that he was out on Work Release. The next witness that the Defendant called was Josie Caldwell, the Defendant's mother. She told you that she was 50. She was his mother. That he had 8 brothers and sisters and that 5 of the family -- 5 of the children were living at home. She told you that as a child, the Defendant was a good child. That she and her husband saw that he was in church and Sunday School and she classified her son as -- I wrote it down -- "exactly like most children." Nothing abnormal about his behavior. At this point, the Defendant offered no more witnesses and the State, feeling that we had nothing to rebut, called no witnesses in rebuttal. So that, ladies and gentlemen, is what you have before you. This phase of the trial will follow the first phase in that in determining the punishment, you must -- you must decide this case from the facts that have been proved and you as a finder of facts, determine those facts, then you must, you must, apply the law that the Court has given you. The Court tells you in Instruction S-3, in order to return the death penalty you must first find that there are aggravating

circumstances. Those are the circumstances which tend to warrant the death penalty. When you find that there are, if you do, you must additionally find that those aggravating circumstances outweigh the mitigating circumstances, or the circumstances which tend to warrant the less severe penalty. The Court tells you on the issue of aggravating circumstances, consider only the following: Number 1: -- and, bear in mind, ladies and gentlemen, this must be proved. Now, if those issues of aggravation have not been proved beyond a reasonable doubt, you can't consider them. The Court tells you, "Consider only the following elements of aggravation, Number 1: The capital offense was committed while the Defendant was engaged in the commission of robbery or attempted robbery." I think we can all conclude, that you, the Jury, have found, by your verdict of capital murder that the offense was committed during the crime of robbery or attempted robbery. Circumstance Number 1 -- proven. Hard, cold facts -- proven. Proven in the first phase of this trial. Proven by your very verdict. Number 2: "The capital offense was committed for pecuniary gain." A long sounding legal word that means money. It means money. Why did this Defendant arm himself with that pistol and go in that store and throw down on that lady and pick up that bank bag and run? Money! That's why robbers rob. They don't do it for fun. It's a business. It's for money. A fact, in my judgment, that has been proved beyond a reasonable doubt. Aggravating Circumstance 3: "The capital offense was especially heinous, atrocious or cruel." In my judgment a fact

proven beyond every reasonable doubt. How much more cruel, how much more heinous, how much more atrocious an act could have been committed against that lady on October 29, 1980, when she was gunned down, not once, but twice. A 48 year old mother of 6, unarmed, defenseless, at the mercy of a cold blooded killer, 24 years old, armed with a 38 Special pistol. Ladies and gentlemen, that Circumstance Number 3 has been proven to you, in my judgment, beyond a reasonable doubt and to a moral certainty. That the act that this Defendant committed was heinous, atrocious and cruel. Circumstance Number 4 that the Court tells you that you can consider, if proved --"The Defendant was previously convicted of four felonies involving the use or threat of violence to the person." Proven beyond a reasonable doubt and to a moral certainty. Four felonies -- previous convictions -- of this Defendant involving what? The use of violence or the threat of violence. Conviction 1: Armed Robbery -- violent crime -- violent crime. Conviction 2: Aggravated Assault -- violent crime. Conviction 3: Attempted Armed Robbery with a firearm -- violent crime three, and finally, Talobusha County, Conviction 4: Armed Robbery with a firearm. Violent crime four. Ladies and gentlemen, there are four very good reasons why the death penalty is appropriate punishment and I hold them in my left hand. This is not a first offender. This is not a person who made one mistake. This is a person who committed armed robbery, convinced the Department of Corrections that he was not a risk and got out and committed four violent crimes, and crime number five was the very

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Ladies and gentlemen, I inted to be brief. I'm in complete disagreement with the approach the defense has taken I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet, they...

COUNSEL FOR DEFENDANT (Mr. Horan): Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the Jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY (Mr. Williams): Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell

out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and, I think it's unfair and I don't mind telling them so. Now, thank God, you have a yardstick to follow. Thank God, you have a set of rules and regulations like they do in a football game. What are the rules and regulations that you, under your oath, must follow in determining the punishment? Number 1, under your oath, you must decide the facts. That's your job. Not mine, not theirs, not the Judge's, not anybody's -- yours. You decide what those facts are. I can't tell you what they are, and you take the rules of law -- this right here -- the rule book, and you apply them, and you render a fair and impartial trial without passion, without prejudice, without sympathy. They would have you believe that I'm a cold hearted person without compassion. Ladies and gentlemen of this Jury, so help me, God, the day I lose my compassion for human life and human beings, is the very day I'm going to quit this job. I think it's unfair -- totally unfair, to you personally -- it's personally offensive to me, for the approach that was used. I apologize for them. The defense attorneys tell you its not right to take the life of another human being. Now, let's reason a little bit together. Let's look at the animal kingdom. Look at the animal kingdom, now. The most ferocious tiger, the most ferocious lion, does he kill for any other reason except for food for his

family or to protect himself and his family? No. Any other wild animal does not kill for any other reason other than self-preservation. On the other hand, a human being has options. He can kill in self-defense, because he wants to, because he wants money -- for any reason. Compare this Defendant to the most ferocious lion, and decide what punishment is proper. Mr. Horan told you that I'd probably tell you about capital punishment and how it came down from the Courts. I think it's proper. I don't necessarily think that my views are controlling on the issue of capital punishment, and I have definite views. I think each of us do. My views on capital punishment are my views. I would never, I hope, try to force any Jury or any individual Juror to accept my views, if it would do conflict to their own views. I respect the Jury system. I respect the individuals that comprise the Jury system. But, now, let's look at capital punishment a little bit. Years ago, if the finder of fact, the Jury, determined that a person was guilty of capital murder, that person was automatically sentenced to the gas chamber. Automatically. The Supreme Court of the United States, in its wisdom, said "That's a little abritrary. That's a little arbitrary. and there may be some reasons why an automatic death penalty wouldn't be proper." I can see that. I think the wisdom of the Supreme Court -- and I often criticize them. I think that wisdom was justified. There may be cases. There are cases where an automatic death

penalty is unwise and unwarranted. In their wisdom, they said, in order to avoid this arbitrary and capricious imposition of the death penalty, we are going to strike these statutes in these states down until the states comply with what we think should be the way that the death penalty is imposed. This is the people's Court. Since the people have the civic charge to enforce the laws, they ought to have the ultimate decision as to the punishment involved, and they should be given a wide range of facts to determine whether or not capital punishment is appropriate. The death penalty statutes in Mississippi, Georgia, Florida -- yea, the whole United States were virtually abolished. Listening to the command of the United States Supreme Court, our Mississippi Legislature, as well as the other Legislatures throughout the United States, adopted the very procedure that you are undergoing now. They said before the death penalty is arbitrarily automatically imposed, the Jury -- the people -- the people, not the Court -- the people, the heart of the system, must determine -- must determine -- that the aggravating circumstances, those which tend to say that the death penalty is justified, must outweigh the mitigating circumstances, those which say that the lesser should be applied. So, that's how it all evolved, and that's why you're in the Jury Box to determine the punishment, and that's why, I think it's totally improper to put you in the picture of hang man with a black mask on. That's not fair. You must take the rules, apply the law, and render a fair verdict. Now, what are the rules?

If the aggravating outweigh the mitigating and are sufficient to impose the death penalty, you must do it. If the mitigating outweigh the aggravating -- no. Life in prison, if you can agree. And the Court tells you what you may take into consideration on the issues of aggravation and on the issue of mitigation I've gone over the cruel, atrocious, heinous, committed for money, committed during robbery, and I still say the four most important reasons on the issue of aggravation rests in the documents that I hold in my hand. It's easy to say I'm sorry. That's easy. Would have been easy to say I'm sorry in '75 over in Quitman County. I dare say, ladies and gentlemen, that the Department of Corrections heard that phrase. I'm sorry. Yes, lo and behold, after having been sentenced in '75 to 18 years, four years later, robbery, attempted robbery, aggravated assault, capital murder. My daddy told me, and I learned at a very early age, he said, "Son, when you dance, you've got to pay the fiddler." I knew that if I misbehaved, the type of punishment I could expect. It was not too bad. I knew that I was going to get that stern lecture, but I knew that if I misbehaved to such an extent that a lecture wasn't appropriate punishment, I knew -- I knew where I was going. I went in that bathroom and he popped that belt. Let the punishment fit the crime, taking into consideration the aggravation issue and the mitigation issue. Mr. Horan said I would probably tell you that the Defendant didn't

show Mrs. Faulkner mercy. I don't have to, I think that's apparent. I sympathize with the family of this Defendant. I really do, and I say that to you with all the sincerity at my command. I feel for those people, but by golly, those people didn't put that gun in their son's hand. Those people didn't pull that trigger that killed that mother of six, and that man's wife. I feel for the Faulkner family. I'm not without sympathy, as they would have ,ou believe, and I know you're not either. I tell you with all the sincerity at my command, that I sympathize dearly with that family. The families of both, but by golly, neither family put that gun in this Defendant's hand, and neither family pulled that trigger. I think the course is clear. I have tried cases where the death penalty has been imposed by juries, even in this very Courtroom. I've tried cases, even in this Courtroom, where I asked for the death penalty and the jury didn't give it. But never ever, ladies and genelemen, have I ever tried a case where the facts and circumstances surrounding the case call out for and demand the death penalty -- never -- Iassure you on my word, that I have never ever tried a death penalty case in this Courthouse or any other place, where the penalty is more apparent and more called for. The easy way. It's not easy. Maybe I shouldn't have said that word. It's not easy, but the way lies within what the Court has told you. The way lies in the system. Thank God for the sytem. Thank God for

folks just like you, who lay down your pencils, vacuum cleaners and come up here and put on the cloak of civic service. I believe in capital punishment. I don't believe it should be arbitrarily imposed. I believe that there are thugs who are going to rob and kill regardless of what you do, but I firmly believe, and I believe it with all my heart, too, there are some thugs sitting out there on the borderline, and if they know that the people in the people's Court are going to mete out the punishment that fits the crime, I believe they're going to have second thoughts, and if just one thug -- just one, thinks twice about picking up one of there and going in and killing somebody and robbing him, -- if just one person thinks about that, maybe there'll be a family like the Faulkners that'll have a mother and a wife. Yes, maybe there'll be a family like the Caldwells, who will have a son, that's not in the position of this Defendant. I think the course is clear. I think that the evidence supports it. I think the law demands it. One final word, and then I'll sit down, and I know, you'll be glad. The forms of the verdict that were given to you by His Honor and which will be taken by you to the Jury Room, set forth the options. That's in S-3. Option 1, Option 2, Option 3. If you believe that there are sufficient aggravating circumstances to warrant the death penalty and that they outweigh the mitigating circumstances, you must follow the language set forth in Option Number One. "We, the Jury, unanimously

find that the aggravating circumstances of"-- and here you must insert the aggravating circumstances you rely on -- and then picking up --"is sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find that the Defendant should suffer death. Signed by the Foreman of the Grand Jury." The first order of business, in my judgment, is contained in S-1, which tells you that you must, from your members, select a Foreman of the Jury. In the event that you feel that the death penalty is appropriate punishment, please, follow S-3 as to form very carefully. If you cannot agree on the death penalty and find that life imprisonment is appropriate, you must follow Option 2. If you can't agree, Option 3 is the form to follow. In closing, I would submit to you, ladies and gentlemen, that the aggravating circumstances of this crime far, far outweigh the mitigating circumstances. Proof positive in these four exhibits. Proof positive on the issue of aggravation. Mr. Horan would have you believe, from these so-called light sentences, that I set this whole thing up. That this is a Hollywood production. Baloney. He knows that's not so. I know it's not so and I think you do. I didn't put anymore than the family put the pistol in his hand to commit these crimes with. He did. And, if you'll examine these orders, you'll find out that these are not lenient sentences that were imposed in these other crimes.

THE COURT: Are you through with your statement?

IN THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI — PLAINTIVE

VS. — NO. 3603 & 3604

BOBBY CALDWELL — DEFENDANT

MOTION TO APPOINT A PRIVATE PSYCHIATRIST, TO EMPLOY A SPECIAL INVESTIGATOR AT STATE EXPENSE TO INVESTIGATE THIS MATTER, AND TO EMPLOY A FINGERPRINT AND BALLISTICS EXPERT.

COMES NOW, Bobby Caldwell, and through his attorneys, Ben F. Horan and [illegible], files this motion for the Court to appoint a private psychiatrist to examine the Defendant, Bobby Caldwell, and to employ a special investigator at State expense to investigate this matter, and to employ a fingerprint and ballistics expert, and the grounds for said motion we most respectfully show to the Court the following facts, to-wit:

(1)

That your Defendant would show that as a defense to the charge and/or charges alleged in the indictment of insanity and related illnesses at the time of the alleged crime, and that your Defendant represents that he is entitled to have a skilled psychiatrist to examine him so that he will be able to adequately present said defense at the hearing of this matter.

(2)

The Defendant would also show and represent that the State has provided your Defendant with a list of 35 witnesses that they intend to produce when this matter comes on for trial, and that his attorneys do not have adequate time to properly investigate and interview all the witnesses enumerated in the State's Response to Discovery heretofore filed in this cause # 3603 and #3604.

FILED
ROBERT L. CARTER
CIRCUIT CLERK
D.C.

(3)

Your Defendant would show that he is presently incarcerated and has been since the date that he was arrested for the alleged crime of Capital Murder, and has been adjudicated to be a indigent Defendant, and therefore he is not financially able to privately employ a psychiatrist, a private investigator, nor a fingerprint and ballistics expert that he believes would be of great necessarius witness in the defense of the charges lodged against him in the indictment.

Respectfully submitted,

Ben F. Horan

John J. Crow, Sr.

CERTIFICATE OF SERVICE

I, Ben F. Horan, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Motion to the Honorable Robert L. Williams, Assistant District Attorney, at his usual mailing address of 17 West Union Street, Hernando, MS 38632 on this the 16th day of June, 1981.

Ben F. Horan

VACATION TERM

STATE OF MISSISSIPPI

CAUSE NOS. 3403 & 3604

BOBBY CALDWELL

ORDER

This day this cause came on before the Court in Vacation on the motion of the Defendant, Bobby Caldwell, to appoint a private psychiatrist, to employ a special investigator at the State's expense to investigate this matter, and to employ a fingerprint and ballistics expert.

Wherein, the Defendant alleges that said private psychiatrist, special investigator and fingerprint and ballistics expert are necessary to enable him to adequately present his defense or defenses on the hearing of this matter.

The Court having heard and considered said Petition is of the opinion and so holds that the Defendant's motion for the appointment of a private psychiatrist to examine and conduct tests of Defendant is well taken, and that part of the motion is sustained; Dr. Allen O. Battle, of Memphis, Tennessee, is hereby appointed as private psychiatrist of the Defendant, Bobby Caldwell.

That the Sheriff's Department of Panola County, Mississippi, is directed to transport the Defendant, Bobby Caldwell, to and from Batesville, Mississippi, to the DeSoto County Jail at Hernando, Mississippi, so that Dr. Allen O. Battle shall have an adequate opportunity to examine and test said Defendant, Bobby Caldwell. The time and date of the first appointment shall be September 14,1981, at 10 o'clock a.m., and such other times as deemed necessary by the psychiatrist. Said psychiatrist shall be paid the sum of $70.00

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DeSoto County, Miss.

for his professional services rendered, and the appointments between the psychiatrist and the Sheriff's Department shall be scheduled by the psychiatrist in conjunction with the Sheriff's Department.

The Court having considered the other prayers of the motion to employ a special investigator at the State's expense and to employ a fingerprint and ballistics expert, and based on recent Mississippi cases, the Court holds that part of the motion is not well taken, and is by the Court overruled.

It is further the order of the Court that a certified copy of this order shall be the authority for the Panola County Sheriff's Department to provide transportation and security for the Defendant Bobby Caldwell, from Parchman, Mississippi, where he is incarcerated by the Mississippi Department of Correction, and to transport him to and from the DeSoto County Jail at Hernando, Mississippi.

SO ORDERED AND ADJUDGED this the 4th day of September,

CIRCUIT JUDGE

OPPOSITION BRIEF

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-6607

BOBBY CALDWELL,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL
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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. PETITIONER IS BARRED FROM RAISING A POINT HERE WHEN THE STATE COURT HAS HELD THE ISSUE PROCEDURALLY BARRED FOR FAILURE TO FOLLOW STATE PROCEDURAL RULES.

2. WHERE PETITIONER DID NOT DEMONSTRATE REASONS FOR THE NECESSITY OF THE REQUESTED EXPERT WITNESSES THERE IS NO FEDERAL QUESTION AND CERTIORARI SHOULD BE DENIED.

3. WHERE THE QUESTION OF THE PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENTS OF THE SENTENCE PHASE WERE NOT PRESENTED TO THE COURT BELOW THIS COURT HAS NO JURISDICTION TO CONSIDER THE MATTER AND CERTIORARI SHOULD BE DENIED.

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TABLE OF AUTHORITIES

NO. 83-6607

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1983 TERM

BOBBY CALDWELL,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfuly prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Caldwell v. State, 443 So.2d 806 (Miss. 1983). A copy of the opinion is before the Court ar Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 2257(3). He has failed to do so.

CONSTITUTIONAL PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments V, VI, and XIV.

STATEMENT OF THE CASE

Petitioner, Bobby Caldwell, was indicted for the crime of capital murder by the Grand Jury of the Circuit Court of Panola County, Mississippi on February 23, 1981. Appellant obtained a change of venue to DeSoto County, Mississippi. His bifurcated trial was conducted under the procedures set forth in § 99-19-101 through 107, Miss. Code Ann. (Supp. 1982), and Jackson v. State, 337 So.2d 1242 (Miss. 1976). At the conclusion of the first stage of the bifurcated trial the jury retired to consider the issue of guilt. After deliberation the jury returned a verdict of capital murder. The trial then continued into the second or sentencing phase. After hearing additional testimony and hearing arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence were affirmed on November 16, 1983. Rehearing was denied on February 1, 1984. Caldwell v. State, 443 So.2d 806 (Miss. 1983).

Specifically, the facts reflect that early on the morning of October 29, 1080, appellant [1] drove from Como, Mississippi, toward the country bait shop owned by the victim and her husband and situated near Sardis Lake. He parked on a logging road some .2 to .3 miles from the store and walked cross-country thereto. Entering, he accosted Mrs. Elizabeth Faulkner

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1/ Appellant has been previously convicted of armed robbery and at the time of this crime, was on work release from Parchman Penitentiary.

and when she screamed, shot her twice with a .38 caliber pistol. He then snatched a yellow bank bag from the store counter and fled. The victim's husband, hearing the shots from their living quarters to the rear of the store, chased after appellant and fire two shotgun blasts at him as he leaped a barbed wire fence and ran across a pasture. Mr. Faulkner later gave police a description of appellant and his clothing. [2] and made both a pre-trial lineup identification and an in-court identification positively labelling appellant as the lone gunman. In a search begun minutes after the crime, authorities found a brown cotten glove caught in the barbed wire where appellant had jumped. [3] They followed distinctive footprints to a small logging road nearby where freshly made tire tracks appeared. Meanwhile, appellant drove toward Batesville, through three police roadblocks, to his father's home. Officers followed to question him and when they arrived, found appellant washing his car in the backyard. [4] They approached and asked him to accompany them to the jail for questioning about the murder. Instead, he moved toward the open car door whereupon officer Sexton looked through the car window and saw a pistol handle protruding from under the seat. Sexton then subdued appellant, retrieved the gun and took him to jail. The confession was given the next day.

2/ These descriptions matched perfectly with appellant's appearance when later apprehended.

3/ Appellant admitted in his confession that the glove pulled off as he escaped.

4/ The car, a red and white Chevrolet Malibu, was an important factor in causing authorities to suspect appellant. Two witnesses reported having seen him in a red and white car near the store pre-crime. Other officers saw the car go through two police roadblocks. Evidence linking appellant to an earlier Batesville robbery also figured heavily in the chain of probable cause. These facts are discussed later in the brief.

REASONS FOR DENYING THE WRIT

1. Petitioner is Barred From Raising a Point Here When the State Court Has Held The Issue Procedurally Barred From Its Consideration For Failure to Follow State Procedural Rules

Petitioner's argument concerning the arguments of counsel at trial are not properly before this court as the court below held that petitioner was procedurally barred from raising the issue before it. The Court below stated:

> Relying upon Howell v. State, 411 So.2d 772(Miss.1982); Evans v. State,442 So.2d 737 (Miss.1982); Gilliard v. State, 428 So.2d 576 (Miss.1983); and Edwards v. State,441 So.2d 84 (Miss.1983), reversal is sought because the prosecutor commented to the jurors that "the decision you render is automatically reviewable by the Supreme Court." Hill v. State, 432 So.2d 427(Miss.1983), held that the prosecutor's statement to the jury that their finding would not be the "last word" was procedurally waived for failure of any objection being made to the argument. In the present case, objection was made but the matter was not assigned as error on appeal here.
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> * * *
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> Pruett v. State, 261 So.2d 119 (Miss. 1972), is a case in which we dealt with the situation where counsel sought to argue a question not raised by the assignment of error. Writing for the Court in that case, Justice Jones states "We do not deem these matters [those not assigned] plain error..." Bell v. State, 360 So.2d 1206 (Miss.1978), although I dissented because I deemed the record tainted with so many serious errors as to render the trial an improper basis to affirm the death penalty, is analagous to the present case, in that Bell dealt with errors "not urged or argued in the briefs...."
>
> 443 So.2d at 813-14.

Where the Court below decided the issue on state procedural grounds and found it to be procedurally barred this Court has no jurisdiction to consider the matter. Where the issue was not presented to the Court below in a federal constitutional context and the decision there was not based on federal grounds this Court will not consider the issue. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Street v. New York, 394 U.S.576,22 L.Ed.2d 572, 89 S.Ct.1354 (1968); Cardinale v. Louisiana, 394 U.S.437, 89 S.Ct.1162, 22 L.Ed.2d 398(1969).

The issue now presented by petitioner was not properly raised in the Court below and the attempt to do so was on purely State law grounds. There was no federal question presented to the State Court and therefore there is no questions properly before this Court.

Even if there had been a proper raising of the question of mentioning appellate review to the jury during closing argument the question was answered by this court in Maggio v. Williams, ___U.S.___,78 L.Ed.2d 43, 104 S.Ct.311(1983), contrary to petitioner's assertion that the merits were not answered. In Williams, supra, this Court stated:

> Williams' second, third, and fourth contentions warrant little discussion. As Williams made clear in his second petition for state habeas corpus, he challenged the prosecutor's closing argument, either directly or indirectly, in his first state habeas proceeding. The Louisiana Supreme Court ultimately rejected his challenge, although two Justices indicated that the prosecutor's statement raised a substantial question and one concluded that the statements constituted reversible error. State ex rel. Williams v. Blackburn, 396 So.2d 1249(1981). Williams' failure to raise this claim in his first federal habeas proceeding is inexcusable, but the District Court nevertheless gave it full consideration in the second federal habeas proceeding. Applying the standard established in Donnely v DeChristoforo, 416 U.S.637,40 L.Ed.2d 431,94 S.Ct. 1868 (1974), the District Court examined the prosecutor's closing argument at length and concluded that it did not render Williams' trial fundamentally unfair.
>
> 78 L.Ed.2d at 47.

The argument made in the case below was found not to be error as it was fair response to the arguments made to the jury by defense counsel. The court below after holding the issue was barred did state alternatively that the error if error at all was invited.

There being no substantial federal question presented to the Court below and therefore none properly here certiorari should be denied.

2. Where Petitioner Did Not Demonstrate Reasons For the Necessity of the Requested Expert Witnesses There Is No Federal Question and Certiorari Should Be Denied

Petitioner's second reason for granting certiorari is again one where he failed to follow State procedural rules and now seeks to invoke the jurisdiction of this Court to answer questions not raised in a federal context. The rule in Mississippi pertaining to the employment of experts other than mental health professionals, is that the motion requesting such should outline the specific costs for such investigator or expert, and the purpose and value of the expert will be to the defense. Bullock v. State, 391 So.2d 601,607(Miss.1981). Petitioner did neither in his motion to the trial court. The motion simply stated:

> Your Defendant would show that he is presently incarcerated and has been since the date that he was arrested for the alleged crime of Capital Murder, and has been adjud.cated to be a indigent Defendant, and therefore he is not financially able to privately employ a psychiatrist, a private investigator, nor a fingerprint and ballistics expert that he believes would be of great necessarius witness in the defense of the charges lodged against him in the indictment.
>
> Tr. at 26.

This cryptic statement of petitioner does not afford the trial court with any basis on which to grant the motion. Petioner offered no testimony on either point in support of the

motion. He has further failed to show any prejudice in the failure to grant his motion. The failure to follow the procedures outlined by the State courts in attempting to secure an expert bars consideration of the issue here. The issue was decided purely on State law grounds even though a denial of due process was alleged he relied on no federal case or federal constitutional provision in the State Court and the State Court decided the issue solely on State law grounds. Under the rational of Webb v. Webb, supra, Cardinale v. Louisiana, supra. and Street v. New York, supra. the issue is not properly before this consideration. The Court being without jurisdiction certiorari should be denied.

3. Where the Question of the Prosecutor's Statements During Closing Arguments of the Sentence Phase Were Not Presented to the Court Below This Court Has No Jurisdiction to Consider the Matter and Certiorari Should Be Denied

Petitioner has never presented the question of the prosecutors comments during the sentence phase regarding his personal view of whether death should be impor i in the case at bar to the Court below. He attempts to raise this issue for the first time here. He admits that no objection was made at trial and no error assigned on appeal concerning this issue. Pet. Brief at 25.

Under the rationale of Webb v. Webb, supra, and Cardinale v. Louisiana, supra, this Court lacks jurisdiction to decide an issue that has never been presented to the State Courts or was not presented in a federal constitutional context to the State Courts. This fact being admitted by petitioner, his attempt to invoke the jurisdiction of this Court fails.

CONCLUSION

For the reasons stated above the Petition for a Writ of Certiorari to the Supreme Court of Mississippi should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the following:

E. Thomas Boyles, Esquire
Attorney at Law
Post Office Box 846
Smithtown, New York 11787

Attorney for Petitioner

This, the 6th day of July, 1984.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

REPLY BRIEF

ORIGINAL

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6607

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

PETITIONER'S REPLY BRIEF

E. THOMAS BOYLE, P.C.
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July 18, 1984

PETITIONER'S REPLY BRIEF

I.

The State of Mississippi, without addressing the merits of the issue relating to the prosecutor's improper comment on the non-final nature of the jury's determination of death, asserts by opposition that there are two procedural bars to the Court's jurisdiction: (1) that the issue was not assigned as error below in accordance with state law [Brief in Opposition at 4]; and (2) that the issue was not presented to the Mississippi Supreme Court in a constitutional context [Brief in Opposition at 4-5].

The Court has jurisdiction. First, timely* defense objection was raised to the challenged comments at the trial. While it was not"assigned as error"in accordance with state law, the issue was raised by the respondent in the Mississippi Supreme Court and briefed by both sides** and that court addressed the issue in its decision. In his petition for re-hearing (annexed hereto as Exhibit "B") petitioner also addressed the issue. Accordingly, this case is distinguishable from Beck v. Washington, 369 U.S. 541, 553 (1962) where the Court found a waiver based on the failure to set forth the federal issue in the "assignment of errors" below***.

Secondly, the majority opinion indicates that the Court below

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* Thus the trial judge was afforded the opportunity to cure the error. Instead, he ratified it. See Petition at 15.

** The respondent's brief raising this issue below is annexed hereto as Exhibit "A".

*** Whether a federal constitutional question was sufficiently raised below is itself a federal question and the Court is not bound by state court decision. Street v. New York, 394 U.S. 576 (1969).

considered the issue in a federal constitutional context, rejected the constitutional dimension of the issue and decided the question purely as a matter of state law:

> Clearly Ramos leaves the state with the prerogative to determine whether juries should be informed of sentencing alternatives such as parole or commutation of a sentence. By the same reasoning, states may decide whether it is error to mention to jurors the matter of appellate review, which review is mandated by our statute .... On this basis, we think, upon the facts of this case, reversal is not warranted merely because the jurors during the sentencing phase were told that death penalty trials are subject to appellate review by this Court.
>
> Opinion of the Mississippi Supreme Court at 13, annexed to petition at appendix "A".

The federal question in California v. Ramos, U.S. , 103 S.Ct. 3446 (1983) involved the constitutionality of instructions to a sentencing jury in a capital case, under the Eighth and Fourteenth Amendments. The federal constitutional question was raised, considered and rejected by the court below, see e.g., New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (19). Accordingly the Court has jurisdiction here. Saltonstall v. Saltonstall, 276 U.S. 260, 267-268 (19).

II.

The State argues that there is an alternative state ground for rejection of petitioner's second ground for issuance of the writ. The failure to provide experts and an investigator to an indigent accused was raised below as a violation of due process

of law. The Court below indicated that an accused indigent is entitled only to appointed counsel and a psychiatrist. Opinion below at 9, annexed to Petition as "A". The Court rejected any federal constitutional right to expert witnesses and a criminal investigator. This is the real basis for the denial of petitioner's motion, rather than the failure to estimate costs. Accordingly, there is no adequate state ground for the denial.

III.

Respondent claims that the petitioner's third ground for granting the writ was not raised below. The issue is one of federal constitutional proportion. Because of the gravity of the error and the fact that this is a capital case, petitioner urges the Court to invoke its "plain error" power of review over state court determinations. Valchon v. New Hampshire, 414 U.S. 478, 480 n.3 (1974) and cases cited therein.

CONCLUSION

The Court has jurisdiction and should grant the petition.

Dated: July 18, 1984
Smithtown, New York

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
MARCH 1983 TERM

BOBBY CALDWELL	APPELLANT
VERSUS	NO. 54,285
STATE OF MISSISSIPPI	APPELLEE

APPELLEE'S SUPPLEMENTAL BRIEF

BILL ALLAIN, ATTORNEY GENERAL

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH 1983 TERM

BOBBY CALDWELL	APPELLANT
VERSUS	NO. 54,285
STATE OF MISSISSIPPI	APPELLEE

APPELLEE'S SUPPLEMENTAL BRIEF

SUPPLEMENTAL PROPOSITION (SENTENCING PHASE)

THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT CONCERNING POSSIBLE APPELLATE REVIEW OF SENTENCE DOES NOT CONSTITUTE ERROR SO HARMFUL AS TO NECESSITATE REVERSAL.

An issue of common appearance in recent capital appeals once again surfaces in this case in that portion of the prosecutor's closing argument mentioning appellate review post-sentence. Specifically, the allegedly improper comments follow:

> "Ladies and gentlemen, I inted [sic] to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. * * * Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and, I think it's unfair and I don't mind telling them so.
>
> (R. Vol. IV, pp. 680-81)

Objection was timely made by the defense. It was overruled and argument allowed. The issue was not raised in any manner on direct appeal and is thus procedurally barred.

Prior to undertaking response to appellant's challenge, it is helpful and relevant to reproduce a portion of appellant's own closing argument as having "set the stage" for the prosecutor's remark. Revealed at R. Vol. IV pp.678-9, defense counsel argued as follows:

> COUNSEL FOR DEFENDANT (Mr. Crow): Ladies and gentlemen of the Jury, when we started this trial Tuesday, I stated that sometime during this week, you'll be called upon to make one very important decision, probably one of the most important decisions of your life. That is whether to spare the life of another person or kill him, and that's what you'll decide. It's a hard decision. I'm glad I'm not in your chair. What has happened, needless to say, is very terrible. What Bobby Caldwell did is by no means excusable, and he should be severely punished for it. It's a terrible thing when a person's life is taken. He stands before you today and asks that you spare his life. He asks that the rest of his life be spent behind bars. An inmate in the Georgia State Prison wrote a poem and I'd like to read it to you. He titled it "Judgment". It starts off and says, "I prayed and prayed. I've asked the Lord if he judged my trial. When asked for mercy, would he remain cold? Would he make me walk that last mile? Would he be ashamed of my lifeless burned body? A deed he could have easily stopped. If He were the Judge who sentenced me, could he have chose death? No, I think not. Do you actually believe our Father in Heaven hates me and doesn't care? Do you actually believe he delights in my death and destroyed me in the electric chair? I see in your hearts, you know it's not true, but there's a weakness, a lust for revenge. If Jesus felt this way toward you, forget Heaven, no one could get in. Yet I understand and know how you feel because I feel the pain of innocent life lost and parentless children. My soul cries out full of shame. We're all God's children. We care, honor and love, forgiveness, and we have mercy, too. Forgive my mistake. Lend me your hand. Please judge me as Jesus would do." Six hours after he wrote this, he was electrocuted. Now, I'm not standing here

> before you asking you to forgive this man for what he's done. It's impossible. I can't do that. I'm asking you to put him in jail for the rest of his life. He's violated one of the Ten Commandments. "Thou shalt not kill." But, doesn't that apply to us, too? Should we make it our decision to kill someone else? One of the most remarkable phrases I've ever heard was said by a man who was nailed to the cross, who was tortured and just before he died, he said these words, "Father, forgive them for they know not what they do."
>
> (emphasis added)

The presence of both the prosecutor's mention of appellate review and the defense's misrepresentation of the effect of a life sentence point this writer toward a problem which has seemed to concern this Court throughout its handling of recent capital appeals. An instant decision by the United States Supreme Court, California v. Ramos, 33 CRL 3306 (July 6, 1983), suggests that the time is indeed ripe for critical address of the parameters of closing argument in Mississippi as they relate to mention of possible events (parole/review) post-conviction.

Whether in the context of mention of appellate review or reference to parole eligibility, the apparent kernel of this Court's recent concern is the possibility that the jury, as a result of either, might in some way dismiss or diminish the seriousness of the task at hand in reliance on the vague possibility of future events. Evidently, it is this fear which has brought about a more energetic Court scrutiny of allegations of improper closing argument couched on either of these two claims. The seed of this heightened awareness may be traced for all practical purposes to Howell v. State, 411 So.2d 772 (Miss. 1982) and its condemnation of mention of appellate review during summation. 1/ Although not a capital case, it is suggested that the

1/ The Howell opinion stresses the probability that such an argument will cause a lessening of the sense of responsibility felt by the jury, and cites in support cases from foreign jurisdictions. Beard v. State, 19 Ala. App. 102, 95 So. 333 (1923), Hammond v. State, 156 Ga. 880, 120 SE 539 (1923), Kelley v. State, 210 Ind. 380, 3 NE 2d 65 (Miss.1936).

blatant prosecutorial misconduct in Howell helped to hail to the judicial forefront the issue of improper closing argument. It was in this light that Evans v. State, 422 So.2d 737 (Miss.1982) appeared. Evans marked the first capital case to bring before this Court the exact issue now faced, i.e. mention of appellate review during the closing argument at the sentencing phase. While not expressly citing Howell, the Court in Evans intimated that such argument was improper but could be overlooked on appeal where provoked by improper defense closing argument. 2/ Thus, post-Howell the rule appeared to be that mention of appellate review was improper unless it constituted invited error, interjected in response to defense error. Several months later, in the capital appeal of Gilliard v. State, 428 So.2d 576 (Miss.1983), the second spur of the closing argument dilemma, i.e. reference to possible parole, came squarely before the court. Citing Evans, the Court again invoked the "invited error" exception and upheld conviction and sentence. 3/ Additionally, however, the Gilliard opinion expressed decided disapproval of such prosecutorial summation and hinted strongly that the cry of "invited error" might not always remove the taint on appeal:

> The statement by the district attorney constituted error. Prosecuting attorneys often become overzealous in arguing capital cases, particularly when attorneys for the defendant attempt to overemphasize and exaggerate the real meaning of a life sentence in the penitentiary. Prosecuting attorneys should refrain from making

2/ See Howell at 746, stating,

> "If the argument was improper, then it could be said that the appellant's attorney provoked the comment in response to his argument."

3/ Specifically, the Court found

> "Without question those remarks amounted to provocation and caused the district attorney to respond as he did. Therefore, under the decisions of this Court, the error does not require reversal."
> 428 So.2d at 584.

> prejudicial or erroneous remarks, even in response to argument of defense counsel.
> (428 So.2d at 584)

Within a month of Gilliard, the issue of mention of parole was again before this Bench by way of Edwards v. State, [4/] S.Ct. No. 53,800 (aff'd as to guilt, rev'd as to sentence, March 16, 1983) (not yet reported). Despite no citation of Evans or Gilliard, the Court nonetheless summarily invoked the "invited error" doctrine as follows:

> "There is absolutely no valid reason for suggenting to the jury that the defendant will one day be free. However, the analysis does not end there. As suggested by the State's brief, the defendant's counsel invited the district attorney's remarks.
>
> * * *
>
> It is an old principle that an attorney who invites error cannot complain of it, (citations omitted), and this principle negates any merit that the appellant's contention may have had."
>
> (Slip Opinion at 10-11)

Two months later, in Hill v. State, S.Ct. No. 53,795 (aff'd May 4, 1983) (not yet reported), the now familiar challenge appeared to the prosecutor's statement to the jury that their finding would not be the "last word". Noting this reference to appellate review to normally be serious error, the Court still dismissed Hill's claim as procedurally waived by his failure to object during closing argument. The reasoning follows:

> The argument made by the prosecuting attorney to the jury that their verdict was not the "last word" was clearly erroneous and would ordinarily be considered highly prejudicial.
>
> In the usual case the jury merely determines guilt or innocence, and the circuit judge determines the sentence. In a capital murder case the jury also determines the sentence.

4/ This case is presently pending before the Court on the State's Petition for Rehearing.

> Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. Every attorney knows the jury verdict is indeed the last word on a factual dispute. Neither the circuit judge nor this Court is authorized to set aside a jury verdict on conflicting evidence, or a disputed factual issue. Moreover, in a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected.
>
> In Howell v. State, 411 So.2d 772 (Miss. 1982), which was not a death penalty case, we condemned a "last word" argument.
>
> A prosecutor making this sort of argument is asking for a mistrial.
>
> In this case, however, there was no objection made to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. See Coleman v. State, 378 So.2d 640 (Miss.1979); Thomas v. State, 358 So.2d 1311 (Miss.1978); Griffin v. State, 292 So.2d 159 (Miss.1974); Myers v. State, 268 So.2d 353 (Miss.1972); Peterson v. State, 242 So.2d 420 (Miss.1970); Ford v. State, 227 So.2d 454 (Miss.1969); Showers v. State, 227 So.2d 452 (Miss. 1969); and Coburn v. State, 250 Miss. 684, 168 So.2d 123 (1964). It need also be noted that this holding has applied to death penalty cases, as well as other criminal and civil cases.
>
> (Slip opinion at 21-22)

Quick review reflects that this precise issue centered in closing arguments has arisen in four of the last seven capital appeals brought before this Court. Although no case has been reversed therefor, the comments have been strongly condemned, especially in oral arguments before the Court. The State has sidestepped reversal in three cases on a theory of "invited error" and in the fourth, on a procedural bar. Additionally, three (3) cases argued and awaiting decision by the Court involve this same question. Walter Williams v. State, (S.Ct. No. 54,294) (argued May 31, 1983), Arthur Ray Lanier v. State, (S.Ct. No. 54,208) (argued July 7, 1983), Gregory Montecarlo Jones v. State, (S.Ct. No. 54,067) (argued March 31, 1983).

Excluding the present brief, another two cases are currently being briefed as to this question. William Wiley v. State, (S.Ct. No. 54,642), John Earl Booker v. State, (S.Ct. No. 54,696). Thus computed, five (5) capital sentences currently hang in the balance, a part of each resting in an assault on closing argument.

The increased emergence of this topic cries out for a brightline ruling from this Court to quell the present confusion statewide. The state suggests that the compelling logic of the United States Supreme Court in California v. Ramos, supra, provides the answer. In Ramos, a challenge was made to a state jury instruction which told the jury that

> "under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> "Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."
>
> (33 Cr.L 3307)

On direct appeal, the California Supreme Court concluded that the instruction violated the Eighth and Fourteenth Amendments in two ways. Initially, the instruction was found to "invite the jury to consider factors that are foreign to its task of deciding whether the defendant should live or die, . . . and injects in entirely speculative element into the capital sentencing determination." (at 3307) Secondly, the California Court found the instruction to "leave the jury with the mistaken belief that the only way to keep the defendant off the streets (was) to condemn him to death." (id.) [Certainly the initial concern of the California Supreme Court is closely akin to the apparent concern of this Court as set forth in Howell, supra.]

On certiorari to the United States Supreme Court, the issues in Ramos remained two-fold: (1) whether the instruction injected a speculative factor, consideration of which deflected the jury's attention from the task of meting punishment based on the character of the defendant and the nature of the offense; and (2) whether the instruction misled the jury by selectively alerting them to the Governor's power to commute one of its sentencing orders but not the other.

Before directly addressing these claims, Justice O'Connor, writing for the majority, re-noted some well-established guidelines relative to the interplay of federal and state law in capital sentencing. These tenets are especially appropos here as they underscore the ability of state courts to delineate, as a matter of state law, what information is relevant during the sentencing phase. Of special note is the recognition in Ramos that

> "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deemed particularly relevant to the sentencing decision.

(at 3308), citing Gregg v. Georgia, 428 U.S. 153, 192 (1976). It is crystally clear, in the wake of Ramos that beyond the fundamental constitutional minimums outlined in Furman v. Georgia, 408 U.S. 238 (1972) and developed in its progeny, "the [Supreme] Court [defers] to the State's choice of substantive factors relevant to the penalty determination." (Ramos at 3309)

Framed thusly, the high Court proceeded to determine the constitutionality and propriety of a jury's consideration of possible commutation. On this point, the language of the opinion is bluntly persuasive and conclusive:

Addressing respondent's specific arguments, we find unpersuasive the suggestion that the possible commutation of a life sentence must be held constitutionally irrelevant to the sentencing decision and that it is too speculative an element for the jury's consideration. On this point, we find Jurek v. Texas, 428 U.S. 262 (1976), controlling.

The Texas capital sentencing system upheld in Jurek limits capital homicides to intentional and knowing murders committed in five situations. Id., at 268. Once the jury finds the defendant guilty of one of these five categories of murder, the jury must answer three statutory questions. If the jury concludes that the State has proved beyond a reasonable doubt that each question is answered in the affirmative, then the death sentence is imposed. In approving this statutory scheme, the joint opinion in Jurek rejected the contention that the second statutory question — requiring consideration of the defendant's future dangerousness — was unconstitutionally vague because it involved prediction of human behavior.

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . .And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." Id., at 274-276 (footnotes omitted).

By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Like the challenged

> factor in Texas' statutory scheme, then, the Briggs Instruction focuses the jury on the defendant's probable future dangerousness. The approval in Jurek of explicit consideration of this factor in the capital sentencing decision defeats respondent's contention that, because of the speculativeness involved, the State of California may not constitutionally permit consideration of commutation.
>
> (emphasis added)

* * *

> The Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Next, the Court took to task the concern apparent in the recent criminal opinions of our own state, i.e. that an introduction of commutation, or by analogy parole or appeal, deflects the jury from undertaking its central task. Ramos is equally powerful in answering this fear.

Closely related to, yet distinct from respondent's speculativeness argument is the contention that the Briggs Instruction is constitutionally infirm because it deflects the jury's focus from its central task. Respondent argues that the commutation instruction diverts the jury from undertaking the kind of individualized sentencing determination that, under Woodson v. North Carolina, 428 U.S. at 304, is "a constitutionally indispensable part of the process of inflicting the penalty of death.

As we have already noted, supra, at 10, as a functional matter the Briggs Instruction focuses the jury's attention on whether this particular defendant is one whose possible return to society is desirable. In this sense, then, the jury's deliberation is individualized. The instruction invites the jury to predict not so must what some future Governor might do, but more what the defendant himself might do if released in society.

Any contention that injecting this factor into the jury's deliberations constitutes a departure from the kind of individualized focus

> required in capital sentencing decisions was implicitly rejected by the decision in Jurek. Indeed, after noting that consideration of the defendant's future dangerousness was an inquiry common throughout the criminal justice system, the joint opinion of JUSTICES Stewart, POWELL, and STEVENS observed: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." 428 U.S., at 276. As with the Texas scheme, the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condiction. Cal. Penal Code Ann. §190.3 (West Supp.1983).
>
> (emphasis added)

Noting the inherent difference in the guilt phase, where there is indeed a "central" issue of guilt or innocence, Ramos recognizes that in the sentencing phase, there exists "no similar 'central issue' from which the jury's attention may be diverted" (at 3311). Accordingly,

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstances, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting . . .those defendants who will actually be sentenced to death." Zant v. Stephens, ___U.S., at ___(footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See p.10, supra. This element "is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant." Id., at ——(REHNQUIST, J., concurring in the judgment).
>
> (id.)

Appellant's closing argument in the instant case, that the jury effectively remove appellant from society forever by giving him a sentence of life imprisonment, is a misstatement of the law. Parole

exists as a possibility in every life sentence save those persons convicted and sentenced to life as nabitual criminals. Thus, informing the jury of possible parole is no more than "an accurate statement of a potential sentencing alternative." (Cf. Ramos at 3311). As noted by the Supreme Court, this is proper knowledge for the jury:

> Finally, we emphasize that informing the jury of the Governor's power to commute a sentence of life without possibility of parole was merely an accurate statement of a potential sentencing alternative. .o describe the sentence as "life imprisonment without possibility of parole" is simply inaccurate when, under state law, the Governor possesses authority to commute that sentence to a lesser sentence that corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence. See also n. 18, supra.
>
> (id.)

In sum, the Ramos decision leaves to the individual states the determination of whether juries should be informed of sentencing alternatives such as commutation or parole. By analogy, the state here suggests an equivalent state by state option exists relative to mention of appellate review. Accordingly we urge this Court to carve an exception in the general proscription against providing the jury with such information and expressly allow its use in the sentencing phase of capital crimes.

Rather than sidestep the existing law by procedural vehicles such as invited error and procedural waiver, our state courts should recognize the very real differences in the guilt and sentencing phases and bring into open view all the factors pertinent to sentencing. It indeed appears a perplexing inconsistency that we vest a twelve-person jury with the most significant duty in the criminal system, i.e. deciding whether a person will live or die, yet bind them in ignorance of relevant portions of the law because we fear their inability to discern and render an objective decision. A

capital sentencing jury should be no less aware of sentencing alternatives and procedural safeguards than is a sentencing judge in a non-capital criminal case. No one questions a judge's sentence, in all cases rendered with full knowledge of what may occur down the line relative to appeal, parole, pardon, or commutation. In sum, the recurrent problem with closing arguments in capital trials is the direct result of use of inapplicable legal rules of exclusion. These rules are inimical to a fair and objective sentence in a capital case and should be abandoned.

The state here encourages the Court to credit capital jurors with some ability to make discriminating findings based on reasoned consideration of all the factors relevant to sentence. Urged is a recognition such as that voiced by the Fifth Circuit Court of Appeals in U.S. v. Cochran, No. 82-4164 (5 Cir.1983),

> "We do not view juries as emotional slot machines and do not suppose them to be so. Instead we review this type of hyperbolic statement with some level of confidence in the maturity of twelve citizens selected to sit in a federal criminal trial."

The state wishes to make very clear that we do not suggest the Court refrain from noting and condemning obvious instances of prosecutorial misconduct during closing argument. Over-zealous prosecution evidenced by overbearing closing remarks relative to parole or appellate review deserves and demands strigent denunciation. What the State does urge, however, is that the prosecutor' conduct form the cause of censure rather than the mere mention of parole or review constituting automatic error. 5/

The frequency with which this issue is appearing before this Court signals the great need that it be quickly laid to rest.

5/ In example, we recall Howell, supra, and its repeated reference to numerous prosecutorial attempts to override and ignore the trial court's ruling to desist from the argument concerning appeal.

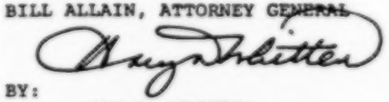
Several pathways are possible to conclusively resolve the problem. Most forcefully, the State urges that possible parole and appeal be brought from the shadows and openly exposed, in proper context, to the jury. Should the Court find closing arguments an undesirable vehicle, we suggest they be presented via succinct jury instructions. This mode has the attractive feature of removing the issue from the mouths of the attorneys and framing it more objectively as the law of the case given by the trial judge. Emotional exaggeration is thus a less likely pitfall.

Should the Court dismiss the State's argument and invoke its power to conclusively foreclose any mention of either parole or review, we still urge a bright-line rule be posted and prosecutors be told that from hence forth, mention of either issue will constitute reversible error per se. We repeat that this issue is far too vital to be left to purely procedural handling. For the reasons set forth above, we entreat the Court to address and resolve this question.

As a final cautionary measure, the State argues that should the Court decide to address the closing argument issue, the challenge of the prosecutor's argument in this case should be barred for not having been raised on appeal. Additionally, the error was invited by the defense. Evans, supra, Gilliard, supra, Edwards, supra. Appellant's closing argument clearly sought to convince the jury that their verdict finally concluded any and all future consideration of Bobby Caldwell or his crime. This was a misleading and erroneous suggestion and required correction by the District Attorney.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL



BY:
AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE

I, Amy D. Whitten, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day personally hand delivered a true and correct copy of the APPELLEE'S SUPPLEMENTAL BRIEF to Cleve McDowell, Attorney at Law and Ellis Turnage, Attorney at Law at the Justice Building in Jackson, Mississippi.

This the 26th day of August, A. D., 1983.

SPECIAL ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF MISSISSIPPI
NO. 54,285

BOBBY CALDWELL

V.

STATE OF MISSISSIPPI

PETITION FOR REHEARING

Comes now the Petitioner, BOBBY CALDWELL, by and through his attorney fo record, CLEVE MCDOWELL, and submits the following as his Petition herei, to-wit:

I.

THE COURT IS URGED TO SUBMIT THIS CABSE TO JUSTICE HAWKINS FOR CONSIDERATION AND A "TIE-BREAKING" VOTE ON THE PENALTY PHASE TO CREATE MEANING APPEALLATE REVIEW.

It is urged that meaningful appellate review is a constitutional requirement in death penalty cases. Since Justice Hawking did not participate, it is urged that a meaningful appellate review has not taken place as long as this Court remains evenly divided on the punishment phase of the Trial here. It is therefore urged that this matter be referred to Justice Hawkins as a matter of procedure in order that the "tie" vote on the penalty pahse be "broken". The United States Supreme Court has discussed the procedures required by the Constitution in dapital sentencing, determinations many times. THE CHIEF JUSTICE explicitly noted in

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion), that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." See also Beck v. Alabama, 447 U.S. 625, 638, N. 13 (1980). Because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280 (1976), at 305. "It is of vital importance to the Defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state Court judgment, the severity of the sentence mandates careful scrutinizing in the review of any colorable claim of error.

II

THE MAJORITY OPINION OF MISSISSIPPI SUPREME COURT ERRED IN APPLYING THE RULING OF THE STATES SUPREME COURT IN CALIFORNIA V. RAMOS, U.S. , 103 S. Ct. 3446,77 L.Ed. 2d 1171 (1983).

In the Mississippi Supreme Court ruling herein at page 13, the Court, while considering Phase II of the trial, stated as a majority opinion in part:

> Clearly, Ramos leaves the state with the prerogative to determine whether juries should be informed of sentencing alternatives such as parole, or commutation of a sentence. By the same reasoning, states may decide whether it is error to mention to jurors the matter of appellate reveiw, which reveiw is mandated by our statute: Mississippi Code Annotated §99-19-105 (Supp. 1982). On this basis, we think, upon the facts of this case, reversal is not warranted merely because the jurors during the sentencing phase were told that death penalty trials are subject to appellate review by this Court.

It is urged that the conclusion reached above was a misapplication of Ramos as it relates to advising jurors that a death verdict is not final as happened in the instant case. In commenting upon advising jurors that a death verdict is not final, the Court stated in Ramos that:

> In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final" may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.
>
> 51 Law Week 5226 (6-28-83)

III

THE COURT ERRED IN FINDING THAT THE TRIAL COURT'S REFUSAL TO PROVIDE THE ACCUSED WITH AN EXPERT IN THE FIELD OF BALLISTICS WAS NOT A DENIAL OF DUE PROCESS.

The Petitioner reiterates his argurent hereunder that the failure of the Trial Court to appoint a ballistics expert and other experts to rebut evidence given by the State's experts was a violation of constitutionally guaranteed rights of due process and equal protection. In ruling uponthis issue this Court cited Phillips v. State 197 So. 2d 241 (Miss. 1967), in which was indicated:

> Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel. (Emphasis Ours.)

It is therefore urged under the Constitution of the State of Mississippi and the United States of America, that due process and equal protection requires that an indigent person be given a fair trial and that expert witnesses are just as essential as the appointment of legal representation.

It is therefore urged under the Constitution of the State of Mississippi and the United States of America,

that due process and equal protection require that an indigent person be given a fair trial and that expert witnesses are just as essential as the appointment of legal representation. The U.S. Supreme Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion, Black,) States v. Edwards, 488 F. 2d 1154, 1163 (5th Cir. 1974) (reversing conviction where indigent defendant was not provided with a psychiatrist's assistance in preparing and providing his defense.) Where the development of expert evidence by a psychiatrist respecting a defendant's sanity has been hampered because of indigency, courts in federal cases have not hesitated to vacate the conviction and remand for a new trial with evidence received as to a psychiatric examination and an opinion of the accused's mental condition at the time of the offense. E.g., id., supra; United States v. Fessel, 531 F. 2d 1275 (5th Cir. 1976); United States v. Taylor, 437 F. 2d 371 (4th Cir. 1971); Gwaley v. Peyton, 368 F. ed 1002 (4th Cir. 1966).

> [W]hen an insanity defense is appropriate, the indigent defendant is entitled to psychiatric assistance necessary to bothethe preparation and presentation of an adequate defense.

United States v. Lincoln, 542 F. 2d 746, 750 (8th Cir. 1976), cert. denied, 429 U.S. 1006 (1977).

1. There Was A Breakdown In The Adversary Process In This Case Because Petitioner Was Foreclosed By His Indigency From Cttainint An Investigator, Finger-Print Expert And Ballistics Expert To Assist In Providing and Preparing His Case.

"One of the assumptions of the adversary syster is that defendant's attorney will have at his disposal

the essential means and elements to conduct an effective defense." Report of the Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice 45-46 (1963) (hereinafter "Attorney General Report"). Accordingly, "[I]t follows that in so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversarial system: Id. at 11. See also, 1964 U.S. Code Cong. & Ad. News 2996 (setting forth rationale for the Federal Criminal Justice Act).

Petitioner's conviction is tainted because it was not the result of a vigorous adversarial contest.

2. Denial Of Petitioner's Request For Expert Assistance Violated His Right To Individualized Sentencing.

There is no need to elaborate on the U.S. Supreme Court's insistence that there be individualized sentencing by the jury in capital cases during the second stage of the bifurcated trial, the sentencing stage. E.g., Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. oklotoma, 455 U.S 153, 206 (1988); Lockett v. Ohio 438 U.S. 586 (1978); Zant v. Stephens, ___U.S.___, 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Woodson v. North Carolina, 428 U.S. 280,304-06 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable." Westbrook v. Zant 704 F. 2d 1487, 1496 (11th Cir. 1983). Where a defendant raises an insanity defense byt is found guilty, a jury, at the penalty stage, may considerthbe psychiatristeveidence presented in the first state of the trial as a mitigating factof. Smith v. Estelle, 445 F. Supp.

647 (N.D. Tex. 1977), aff'd 6C2 F. 2d 694 (5th Circuit 1979), aff'd 451 U.S. 454 (1981). Hence, when Petitioner was precluded from developing evidence in support of his defense, he was also precluded from developing such evidence for use in mitigation of punishment at the sentencing stage. Furthermore, Petitioner was denied his right to individualized sentencing and to effective assistance of counsel at that stage when he was refused an expert's assistance in developing mitigating evidence that could have been produced by said experts.

IV.

The Ruling of the Co rt Herein May Have Established That Pe itioner Was Deprived Of Effective Assistance Of Counsel.

In several comments in the majority opinion on Phase II of the trial, this Court noted "inaccuracies" stated by the defense counsel which "invited" the responses of the Prosecutor which have clearly been held improper argument unless invited by the opposite counsel. This Court stated at page 12 of its opinion that:

> We note here that defense counsel's closing argument for Bobby Caldwell in the present case stated that the jury should effectively remove Caldwell from society forever by giving him a sentence of life imprisonment. This is an obvious inaccuracy and mistatement of the law because there is almost always a possibility of parole in every case, except cases involving persons convicted and sentenced as habitual criminals.

The Court continued its criticism of the defense counsel on page 13 of the opinion:

> Again, it is pointed out taht it was here in the present case, during defense counsel's argument, that he inaccurately sought to convinve the jury that if they meted out a life sentence the defendnat would remain in prison the remainder of his life. He left them with the impression that there would be no parole or commutation of sentence. He emphasized his pitch for mergy by referring to the Ten Commandments, Jesus and the Heavenly Father. In this context, and upon

> the cogent evidence of the defendant's guilt, we do not think the punishment phase should be reversed merely because the prosecutor (subsequent to the defense argument) and then the judge truthfully and accurately stated that the sentence of death would be automatically reviewd by a higher court.

The Defense counsel was further criticized by the Court at page 14 of the Opinion:

> This case is factually distinguishable from Howell, Evans, Gilliard, Edwards and Hall, Supra. While the error complained of here was not invited to the extent that the reviewability of death penalty cases was mentioned first by defense counsel, defense ocunsel sought to leave the impression that a life imprisonment sentence would absolutely leave the defendant behind bars the rest of his life.[2] upon the evidence and posture of this record, reversal is not warranted.
>
> ([2] To that extent, the response of the prosecutor was invited.).

It is therefore, urged that the sharp criticism of the defense counsel herein may have established that the Petitioner was deprived of effective assistance of counsel.

The special and irrevocable nature of the death penalty mandates a stricter standard of attorney competence, requiring more complete investigation and presentation of mitigating data than might otherwise be necessary. This higher standard, See Goodpaste, The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev 299 (1983), is virtually compelled by the principles of numerous United States Supreme Court death cases. In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that since death is fundamentally different from all other punishments, there is a correspondingly greater need for reliability in the decision to impose it, requiring the sentencer to examine carefully the individual background and record of each defendant. In Gardner v. Florida, 430 U.S. 349, 360 (1977), the Court stressed the

crucial role in developing and presenting the capital defendant's case. Most important, in Lockett v. Ohio 438 U.S. 586, 604-05 (1980), the Court held that a capital defendant must be permitted to present any desired evidence in mitigation during the penalty phase of a capital case. The Court reiterated the special need for reliability in death sentencing, id. at 603, and noted that the principle of individualized sentencing, while resting on sound public policy grounds in most criminal cases, was constitutionally mandated in death penalty cases. **

In the context of a capital case, these requirements are particularly stringent. The higher standards reflect the constitutional recognition that "because there is a quantative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Zant v. Stephens (quoting Woodson v. North Carolina, 428 U.S. at 305). Consequently, the Supreme Court has held that the imposition of the death penalty requires a higher standard of procedural fairness. Garner v. Florida, 430 U.S. 349 (1977).

** Thus, in Washington v. Strickland, 693 F. 2d 1243 (5th Circuit 1982) (en banc) cert granted, No. 82-1554, the Fifth Circuit stated a standard for effective assistance to be applied in capital cases. The Court reaffirmed that the right to effectiveness counsel, id. at 1250, and that a showing of ineffectiveness need only be made by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, this Court should reconsider the opinion issued herein and should reverse both phases or in the alternative, reverse the penalty phase herein.

This, the 28th day of November, 1983.

Respectfully Submitted,

BOBBY CALDWELL

BY: Cleve McDowell

CLEVE MCDOWELL
Attorney at Law

CERTIFICATE OF SERVICE

I, CLEVE MCDOWELL, Attorney herein, do hereby certify that I have on this day mailed a true and correct copy of the above and foregoing Petition For Rehearing to the Honorable Amy Whitten, Special Assistant Attorney General, P.O. Box 220, Jackson, Mississippi, Honorable Andrew C. Baker, Circuit Judge, Whose address is: P.O. Box Drawer 368, Charleston, Mississippi 38921 and Honorable Gerald Chatham, District Attorney, 17 W. Union, Hernando, MS 38632.

This, the 28th day of November, 1983.

Cleve McDowell

CLEVE MCDOWELL

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6607

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

E. THOMAS BOYLE, being duly sworn, deposes and says:

I am a member of the bar of the Court and submit this affidavit with respect to service and timely mailing, pursuant to Rule 28 of the Court.

On the 19th day of July, 1984, deponent served the within Petitioner's Reply Brief upon EDWIN LLOYD PITTMAN, Attorney General State of Mississippi, P.O. Box 220, Jackson, Mississippi 39205, attorney for respondent in this action, the address designated by him for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

The above documents were mailed by me at the United States Post Office, located at Smithtown, New York, on July 19, 1984, properly addressed to the Clerk of the Court, Hon. Michael Rodak, Jr., Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543, with first class postage prepaid, within the time allowed for filing.

E. THOMAS BOYLE

Sworn to before me this
19th day of July, 1984

Notary Public

MARIA J.W. DE BRUS
NOTARY PUBLIC, State of New York
No. 4713858
Qualified in Suffolk County
Commission Expires March 30, 1985

JOINT APPENDIX

No. 83-6607

In the Supreme Court of the United States

OCTOBER TERM, 1984

BOBBY CALDWELL, PETITIONER

v.

THE STATE OF MISSISSIPPI, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

JOINT APPENDIX

E. THOMAS BOYLE, P.C.
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Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED APRIL 20, 1984.
CERTIORARI GRANTED OCTOBER 9, 1984.

59pp

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2. Arrest of Petitioner—October 29, 1980
3. Indictment—February Term 1981
4. Motion for Appointment of Investigator, Ballistics and Fingerprint Experts and Psychiatrist—June 16, 1981
5. Change of Venue to Desoto County for Trial—July 30, 1981
6. Dates of Trial—October 5, 6 and 7th, 1981.
7. Sentence—December 1, 1981
8. Affirmance by the Mississippi Supreme Court December 21, 1983
9. Denial of petition for re-hearing by the Mississippi Supreme Court—February 1, 1984

THE STATE OF MISSISSIPPI
FIRST DISTRICT

PANOLA COUNTY
FIRST JUDICIAL DISTRICT

CIRCUIT COURT

SPECIAL FEBRUARY TERM, A.D. 1981

No. 3603

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of the First District, Panola County thereof, duly elected, [illegible] sworn and charged to inquire in and for said District, County and State aforesaid, at the Term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That BOBBY CALDWELL [illegible] of the District and County aforesaid, on or about the 29th day of October, in the year of our Lord, 1980 in the District, County and State aforesaid, and within the jurisdiction of this Court, did unlawfully and wilfully and feloniously of his malice aforethought, did kill and murder ELIZABETH FAULKNER, a human being, while in the commission of the crime of Robbery, or in an attempt to commit Robbery, in direct violation of Section 97-3-19(2) of the Miss. Code 1972 Annotated, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

STATE OF MISSISSIPPI
PANOLA COUNTY

I certify that this is a true copy of Indictment in Cause 3603 as same appears in Criminal records of my office.

Given under my hand and seal this 12 day of August 1981.

Robert L. Carter
Circuit Clerk

By /s/ Robert L. Carter
D.C.

A True Bill

/s/ Robert L. Williams
Asst. District Attorney

/s/ Lyn C. Arnold
Foreman of the Grand Jury

Filed 23 day of Feb., 1981

/s/ Robert L. Carter
Clerk

Recorded 23 day of Feb., 1981

/s/ Robert L. Carter
Clerk

By /s/ Sandra B. Arnold
D.C.

IN THE CIRCUIT COURT OF
PANOLA COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 3603 & 3604

STATE OF MISSISSIPPI, PLAINTIVE

vs.

BOBBY CALDWELL, DEFENDANT

MOTION TO APPOINT A PRIVATE PSYCHIATRIST, TO EMPLOY A SPECIAL INVESTIGATOR AT STATE EXPENSE TO INVESTIGATE THIS MATTER, AND TO EMPLOY A FINGERPRINT AND BALLISTICS EXPERT—Filed June 17, 1981

Now comes Bobby Caldwell by and through his attorneys, Ben F. Horan and John J. Crow, Jr. and in behalf of the defendant, Bobby Caldwell, and files this motion for the Court to appoint a private psychiatrist to examine the Defendant, Bobby Caldwell, and to employ a special investigator at State expense to investigate this matter, and to employ a fingerprint and ballistics expert, and the grounds for said motion we most respectfully show to the Court the following facts, to-wit:

(1)

That your Defendant would show that as a defense to the charge and or charges alleged in the indictment of insanity and related illnesses at the time of the alleged crime, and that your Defendant represents that he is entitled to have a skilled psychiatrist to examine him so that he will be able to adequately present said defense at the hearing of this matter.

(2)

The Defendant would also show and represent that the State has abided your Defendant with a list of 35 witnesses that they intend to produce when this matter comes on for trial, and that his attorneys do not have adequate time to properly investigate and interview all the witnesses enumerated in the State's Response to Discovery heretofore filed in this cause #3603 and #3604.

(3)

Your Defendant would show that he is presently incarcerated and has been since the date that he was arrested for the alleged crime of Capital Murder, and has been adjudicated to be a indigent Defendant, and therefore he is not financially able to privately employ a psychiatrist, a private investigator, nor a fingerprint and ballistics expert that he believes would be of great necessarius witness in the defense of the charges lodged against him in the indictment.

Respectfully submitted,

/s/ Ben F. Horan
BEN F. HORAN

/s/ John J. Crow, Jr.
JOHN J. CROW, JR.

CERTIFICATE OF SERVICE (omitted in printing)

IN THE CIRCUIT COURT OF
PANOLA COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
VACATION TERM

Cause Nos. 3603 & 3604

STATE OF MISSISSIPPI

vs.

BOBBY CALDWELL

ORDER—Sept. 9, 1981

This day this cause came on before the Court in Vacation on the motion of the Defendant, Bobby Caldwell, to appoint a private psychiatrist, to employ a special investigator at the State's expense to investigate this matter, and to employ a fingerprint and ballistics expert.

Wherein, the Defendant alleges that said private psychiatrist, special investigator and fingerprint and ballistics expert are necessary to enable him to adequately present his defense or defenses on the hearing of this matter.

The Court having heard and considered said Petition is of the opinion and so holds that the Defendant's motion for the appointment of a private psychiatrist to examine and conduct tests of Defendant is well taken, and that part of the motion is sustained; and Dr. Allen O. Battle, of Memphis, Tennessee, is hereby appointed the private psychiatrist of the Defendant, Bobby Caldwell.

And the Sheriff's Department of Panola County, Mississippi, is directed to transport the Defendant, Bobby Caldwell, to and from Parchman, Mississippi, to the

DeSoto County Jail at Hernando, Mississippi, so that Dr. Allen O. Battle shall have an adequate opportunity to examine and test said Defendant, Bobby Caldwell. The time and date of the first appointment shall be September 14, 1981, at 10 o'clock a.m., and such other times as deemed necessary by the psychiatrist. Said psychiatrist shall be paid the sum of $70.00 per hour for his professional services rendered, and the appointments between the psychiatrist and the Sheriff's Department shall be scheduled by the psychiatrist in conjunction with the Sheriff's Department.

The Court having considered the other phases of the motion to employ a special investigator at the State's expense and to employ a fingerprint and ballistics expert, and based on recent Mississippi cases, the Court holds that part of the motion is not well taken, and is by the Court overruled.

It is further the order of the Court that a certified copy of this Order shall be the authority for the Panola County Sheriff's Department to provide transportation and security for the Defendant Bobby Caldwell, from Parchman, Mississippi, where he is incarcerated by the Mississippi Department of Correction, and to transport him to and from the DeSoto County Jail at Hernando, Mississippi.

SO ORDERED AND ADJUDGED this the 9th day of September, 1981.

/s/ Andrew C. Baker
ANDREW C. BAKER
Circuit Judge

CIRCUIT COURT OF DeSOTO COUNTY
SEVENTEENTH JUDICIAL DISTRICT
STATE OF MISSISSIPPI

You have found the Defendant guilty of the crime of Capital Murder. You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision you must objectively consider the detailed circumstances of the offense for which the Defendant was convicted, and the Defendant himself.

To return the death penalty, you must find aggravating circumstances, those which tend to warrant the death penalty, outweigh the mitigating circumstances, those which tend to warrant the less severe penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed.

1. The capital offense was committed while the Defendant was engaged in the commission of Robbery or attempted robbery.

2. The capital offense was committed for pecuniary gain.

3. The capital offense was especially heinous, atrocious or cruel.

4. The Defendant was previously convicted of four felonies involving the use or threat of violence to the person.

You must unanimously find beyond a reasonable doubt that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If no elements are found to exist, the death penalty shall not be imposed and you shall write the following verdict on a sheet of paper:

> "We, the Jury, find that the Defendant should be sentenced to life imprisonment."